THE
CAMBRIDGE LAW JOURNAL

APRIL, 1956

CASE AND COMMENT

NATIONALITY—INTERPRETATION OF STATUTE

THE decision of Vaisey J. in *Prince Ernest of Hanover* v. *Att.-Gen.* [1955] Ch. 440, discussed in Mr. Parry's note in the previous number of this Journal, [1955] C.L.J. 142, has been reversed by the Court of Appeal, [1955] 3 W.L.R. 868. The court held that there was no ground on which the plain language of the statute 4 & 5 Anne, c. 16 (1705) could be restricted, and that the plaintiff was consequently entitled to a declaration that he was a British subject by virtue of his descent from the Electress Sophia of Hanover. The court however granted leave to appeal to the House of Lords, and the case will not be noted further at the present stage.

NOTE EDITOR.

CRIMINAL LAW—LARCENY BY A BAILEE AND FRAUDULENT CONVERSION

MR. E. Garth Moore's note upon *R.* v. *Bryant* [1955] 1 W.L.R. 715, in the 1955 number of this Journal, at p. 146, is of considerable interest in that he raises the possibility of the changing of many precedents for indictments, because their reference to sections of the Larceny Act, 1916, would be incorrect in view of the decision in that case that section 2 of the Act did not create an offence, but merely imposed a penalty for the common law offence of simple larceny. The Lord Chief Justice has since pointed out (see [1956] 1 W.L.R. 133) that the case does cause difficulties, but that nevertheless indictments in the customary form are not defective.

But why does Mr. Moore suggest, at p. 148, that the decision "plays havoc with the neat academic distinction between larceny

by a bailee and fraudulent conversion"? Larceny by a bailee is an offence which grew up through the common law and was made a felony in 1857 by the statute 20 & 21 Vict. c. 54, s. 4, now re-enacted in similar words in the Larceny Act, 1916, s. 1. The misdemeanour of fraudulent conversion, on the other hand, was created to cover the case, unprovided for by the common law, of a misappropriation by a person to whom ownership as well as possession of a thing had been transferred. The statute 51 Geo. 3, c. 38, in 1811, was the first to attempt to fill this gap, and other Acts of 1861 and 1900 added to this groundwork, leading up to the present law, contained in sections 20–22 of the 1916 Act. In short, before the nineteenth century the crime of fraudulent conversion did not exist at all, but since its creation it has supplemented that of larceny by a bailee and fulfilled a need in our criminal law. In view of these facts it is hard to see how the decision in *R.* v. *Bryant* can possibly affect the long-established distinction between the two offences, which spring from entirely different sources.

D. C. M. Yardley.

A Reply

Mr. Yardley has, of course, correctly stated the history of the offences of larceny by a bailee and fraudulent conversion; but I am concerned with the law as it is today and for that one must turn to the Larceny Act, 1916. Section 1 defines larceny so as to include larceny by a bailee, without, however, further defining that offence, so that one has to fall back on the common law under which only specific property, as distinct from a fund, can be the subject of larceny by a bailee. But section 20 (1) (iv) states that, if a person "being entrusted . . . with any property in order that he may retain in safe custody or apply, pay or deliver . . . the property . . . or having . . . received any property for or on account of any other person; fraudulently converts . . . the property" he shall be guilty of a misdemeanour. This section creates the offence of fraudulent conversion as we now know it; but its language is wide enough to cover larceny by a bailee. Does it in fact do so? And is a bailee who commits larceny liable under section 20 as well as under section 2? It has for long been thought that the answer is in the negative. But, if the answer is in the negative, a reason has got to be found for excluding from the operation of section 20 conduct which the section in terms appears to embrace. The reason usually advanced has been that the Larceny Act by a number of mutually exclusive sections creates (or re-creates) a number of mutually exclusive offences so

that, if an accused's conduct is already caught by sections 1 and 2, it escapes section 20. But the decision in *R.* v. *Bryant* is to the effect that section 2 does not create an offence at all; it merely imposes a penalty for an existing felony. This may well mean that the old felony of larceny by a bailee now overlaps the new misdemeanour of fraudulent conversion, which means that the neat academic distinction is now blurred.

Of course in practice it may mean nothing of the sort—a possibility at which I hinted in my former note and which is strengthened by the not unexpected pronouncement of the Lord Chief Justice to which Mr. Yardley has referred. Perhaps the process of reflection and retrenchment has begun.

E. Garth Moore.

CRIMINAL LAW—FALSE PRETENCES—STATEMENTS OF INTENTION

The report of the case of *R.* v. *Dent* [1955] 2 Q.B. 590 (C.C.A.) is important to students for two reasons:—

(1) the statement by the Lord Chief Justice that the dicta in *R.* v. *Jones* (1948) 33 Cr.App.R. 11, 12, 13 stating that that case could have been dealt with as larceny by a trick were clearly wrong (*cf.* Kenny, *Outlines of Criminal Law*, 16th ed., p. 216);

(2) the reserved judgment of the Court of Criminal Appeal holding that a promise or other statement of intention as to *future* conduct not intended to be carried out at the time of making it will not *of itself* amount to a false pretence sufficient for a charge of obtaining by false pretences.

R. v. *Dent* was a case of payments made against a promise of future conduct contained in a contract in circumstances where the jury were satisfied that the promisor had no intention of carrying out his contractual promise at the time when the contract and the payments under it were made. The appellant, who carried on the business of a pest destroyer, had entered into contracts with farmers to destroy vermin on their land for a year, and had obtained payment in advance of half the annual charge. The false pretences alleged were in effect that he had falsely represented that he was bona fide entering into contracts for a year and that he had falsely represented that he intended to perform them. The clear cut issue before the Court of Criminal Appeal was whether the statement of intention to carry out the contracts to be implied from entering into the contracts was a sufficient false pretence to found a charge of false pretences on the ground that he had falsely represented

his present intention. And the decision was that "Whatever the position may be in civil cases we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law." The court emphasised two important practical qualifications:

(1) that a false statement of existing fact will be sufficient notwithstanding that it is coupled with a promise as to future conduct, as *e.g.*, in *R.* v. *Jennison* (1862) Le. & Ca. 157;

(2) that a promise as to future conduct indicating immediate readiness and willingness to carry it out, as in *R.* v. *Gordon* (1889) 23 Q.B.D. 354, or indicating present power to carry it out, as in *R.* v. *Bancroft* (1909) 26 T.L.R. 10, may involve sufficient *present* pretences as to readiness and willingness or as to power.

The decision then is a clear ruling that for the purposes of the offence of obtaining by false pretences in the criminal law a false statement of the intention of the obtainor will not suffice *of itself*. The Court of Criminal Appeal did not deny that a false statement of intention may be a statement of existing fact; and accepted as applicable in civil actions for deceit the ruling in *Edginton* v. *Fitzmaurice* (1885) 29 Ch.D. 459 and the celebrated dictum of Bowen L.J. (*ibid.* at p. 483): "There must be a mis-statement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation of a man's mind is, therefore, a mis-statement of fact." It should be pointed out that even as regards civil liability the only alleged false statement on the facts of *R.* v. *Dent* was the statement implied from the contractual promise, and that a plaintiff in such a case may be taken to have relied on the promise as a contractual promise only.

With regard to the criminal law it is interesting to note that the Court of Criminal Appeal approved as an accurate statement of the common law the statement which until 1952 was required to be made to the accused in all courts of summary jurisdiction by section 3 of the Summary Jurisdiction Act, 1899, namely "that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed, *and that a promise as to future conduct not intended to be kept is not by itself a false pretence.*" The Summary Jurisdiction Act, 1899, was repealed by the Magistrates' Courts Act, 1952, and this section was for some

reason not re-enacted in the Magistrates' Courts Act. It may now be advisable for courts of summary jurisdiction to give this warning to the accused as a matter of practice in all charges of false pretences.

Finally, with regard to fraudulent promises there is some protection in other provisions of the criminal law, as, for example, where a person in incurring any debt or liability obtains credit under false pretences or by means of any other fraud under section 13 of the Debtors Act, 1869; or where there has been fraud in connection with dealings in investments within the Prevention of Frauds (Investments) Act, 1939.

A. Ll. Armitage.

CONTRACT—BILL OF LADING—STRIKE CLAUSE

G. H. Renton & Co. Ltd. v. *Palmyra Trading Corporation of Panama* [1956] 2 W.L.R. 232 (C.A.) has aroused wide interest by virtue of its application of common law principles of construction to the terms of the contracts there in question. To the shipping, banking and insurance fraternities, as well as to all engaged in import or export trades, the decision is equally important for its discussion in relation to those contracts of the Hague Rules.

Stated shortly, the question was whether shipowners who issue bills of lading for the carriage of goods from Canada to a named United Kingdom port of discharge can rely upon the so-called "strike clause" now frequently found in such documents. This clause purports to permit the owners in certain specified events including, *inter alia*, strikes at the port of discharge likely to cause delay, to discharge the goods at any other safe and convenient port. It further expressly provides that such discharge may even be effected at the loading port, and that it shall be deemed to be due fulfilment of the contract. In fact, finding the United Kingdom ports strike-bound owing to the nation-wide dock strike of Autumn 1954, the vessel proceeded to Hamburg and there discharged. In order to have their goods brought to the appropriate United Kingdom ports the cargo interests were consequently compelled to incur additional expenditure. This they now sought to recover from the shipowners.

But for the strike clause there is no doubt that the shipowners were in breach of contract. They did not contend that the delay imposed by the strike was of such a nature as to frustrate the bill of lading contracts. They argued, however, that what had been done fell squarely within the clause, and that in consequence they

were under no liability. The cargo interests, on the other hand, claimed that the clause was bad and must be rejected, both at common law and under the Hague Rules which were expressly incorporated into the bills of lading by a Clause Paramount.

The main object and intent of the bills of lading, it was urged, was the delivery of the goods at the port expressly and specifically named therein. The parties had carefully typed in the name of this port, and such typewritten provision must prevail over any printed words to the contrary effect. Reliance was placed upon the words of Lord Halsbury in *Glynn* v. *Margetson* [1893] A.C. 351 at p. 357: "Looking at the whole of the instrument, and seeing what one must regard . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port and deliver at another port. . . ." In the court below McNair J. accepted these arguments, and held that the provisions relied upon by the shipowners were so inconsistent with and repugnant to the primary and unqualified promise to deliver at the named port that they must be rejected. The Court of Appeal reversed this decision.

Singleton L.J. (at p. 247) took the view that the strike clause was not in the nature of a liberty to deviate, but represented a legitimate provision for a substituted method of performance "if that on which the parties have agreed appears to be virtually impossible in the way intended." Jenkins L.J. (at p. 254) stressed that there was a distinction between a deviation clause and the clause in question, for the former purports to enable shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, while the latter operates only in certain specified emergencies. But by the same token while the present clause no doubt operates only in certain broadly defined circumstances it surely purports not merely to enable the shipowner to choose to delay the performance of the contract voyage but to choose never to perform it at all. One may respectfully suggest that there is a good deal to be said for the view which commended itself to McNair J., namely that these bills of lading did not provide for alternative ports of discharge. No doubt it is open to the parties so to provide if they use appropriate language. The wording of the present bills of lading, however, was hardly couched in terms suggesting genuine alternatives, but rather purported to take back with one hand part at least of that which had been given outright with the other. Doubtless every exceptions clause *pro tanto* detracts from a principal obligation. The present clause, however, was not a true exception excusing non-performance if performance

became impossible through an excepted peril. It purported to restore to shipowners who had prima facie bound themselves (subject to exceptions) to deliver at a named port freedom of choice not to deliver there in certain events, while leaving unimpaired their entitlement to full freight. Once the principal object of the contract has been ascertained there is an obligation to perform that object if it remains possible so to do, however inconvenient this may prove. Any clause purporting to allow a party at his option to ignore this obligation is, one might think, inconsistent with the main object and within the words of Lord Halsbury.

However this may be, the holders of the bills of lading went on to argue that in any event the clause was avoided by the Hague Rules. By Article III, rule 2, the carrier is obliged, subject to certain exceptions, properly and carefully to load, carry and discharge the cargo. This, it was urged, imposed a duty both to carry the cargo and to discharge it at the " proper " port, *i.e.*, that named in the bills of lading. Here the carrier was said to be relying upon a clause going beyond the exceptions in Article IV, and in consequence rendered void by Article III, rule 8. Moreover, in as much as the clause sought to permit discharge at the loading port, it attempted to excuse the carrier from his obligation properly to *carry*, and the whole clause was thus again avoided, for Article III, rule 8, did not enable the peccant part of a clause to be severed from the remainder. These contentions had been upheld by McNair J. but were not favoured by the Court of Appeal, which did not find it necessary to decide how far, if at all, severance is permissible under Article III, rule 8. The court held that Article III, rule 2, related to the manner and method of carrying, discharging, etc., and that the parties were free to provide for a substituted place of delivery. As to the argument that the clause would allow the carrier, by discharging at the port of loading, to evade his obligation to carry, Singleton L.J. suggested that this might be " carriage " under Article I (e). It is submitted, however, that the latter Article merely identifies the respective points of time at which the operation of " carriage of goods " begins and ends; it in no sense defines " carriage " itself or the carrier's obligations in relation thereto. In the French text of the Hague Rules the relevant word is " transport," which more clearly suggests movement from one place to another. Even if the Rules leave the parties free to provide for the alteration of the *terminus ad quem* of the voyage, they nevertheless appear to compel the carrier to *carry* the goods, albeit to the terminus so altered. A possible answer to this is that by Article II the duties imposed by the later rules apply " under every contract of carriage of goods by sea "; Article I (b) states that the phrase

" contract of carriage " applies only to contracts of carriage covered by a bill of lading in so far as it relates to the carriage of goods by sea. In so far, therefore, as a bill of lading seeks to provide for no carriage by sea at all, the Hague Rules might *pro tanto* be said to have no application. This approach, however, was not argued and has not been adopted by the Court of Appeal, and it is in any event not without its attendant problems. Thus, if the loading were carried out by the ship, the Rules would apply to the whole operation of loading, which *relates to* carriage by sea: see *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, *per* Devlin J. at p. 415. If the carrier then seeks to discharge at the loading port pursuant to a clause in the bill of lading do the Rules cease to apply, and if so from what point of time? If they continue to apply, the carrier appears to be obliged by Article III, rule 2, to *carry* the goods in the sense of transporting them to a different place. Any clause to the contrary in the bill of lading would consequently be void under Article III, rule 8.

It should also be mentioned that the shipowners in the present case had argued that the provisions of Article III, rule 8, which avoid clauses lessening the carrier's liability " for loss or damage to or in connection with goods " otherwise than as provided in the Rules, relate only to *physical* loss or damage. This argument derives some support from *obiter dicta* in *Constantine* v. *Imperial Smelting Corporation* (1940) 66 Ll.L.R. 147, *per* Atkinson J. at p. 165, and [1942] A.C. 154, *per* Lord Maugham at p. 175. It appears, however, to afford no meaning to the words " or in connection with," and it is submitted that Article III, rule 8, is not confined to physical loss or damage. The Court of Appeal in the present case declined to express any view on the point.

The decision is the first recorded in the English courts, where shipowners have been held justified under a contractual provision in discharging goods at a port other than the port of discharge specifically named in the contract of affreightment and thereafter declining further responsibility. Its implications may be far reaching. Under the standard type of c.i.f. contract the seller is obliged, *inter alia*, to furnish a bill of lading providing a " continuous documentary cover " to the port of destination: *Hansson* v. *Hamel* [1922] 2 A.C. 36. The time may not be far distant when the courts will be asked to decide if a buyer of goods " c.i.f. London " may reject a bill of lading containing a clause like that discussed. In the meantime a banker paying against such a document must, unless expressly authorised to do so by the terms of the relevant documentary credit, incur considerable attendant risks. On principle it should be no answer to say that this type of bill of lading is common form and has

usually in the past been accepted. The contract is " c.i.f. London " and not " c.i.f. Hamburg." Unless some different doctrine is imposed from the House of Lords, the effects of the decision are likely to be felt for some time to come.

R. A. MacCrindle.

CONTRACT—INDEFINITE DURATION—WHETHER DETERMINABLE BY REASONABLE NOTICE

In *Martin-Baker Aircraft Co. Ltd. and Another* v. *Canadian Flight Equipment Ltd.* [1955] 2 Q.B. 556 McNair J. was faced with the difficult task of deciding whether two agreements (a licence to manufacture, sell and exploit certain aircraft products, and an appointment of a sole selling agent in America) were determinable by reasonable notice or were in their nature permanent, or more accurately, determinable only by mutual consent. His findings that the agreements were determinable by notice and that twelve months was a reasonable period of notice were necessarily dependent on the special facts and background of the case and the terms of the particular agreements, but his judgment is valuable for its examination of the general principles to be applied.

Standard works on the law of contract commonly quote or paraphrase the remarks of James L.J. in *Llanelly Ry. & Dock Co.* v. *L. & N. W. Ry.* (1873) 8 Ch.App. 942, 949, that " prima facie every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonable to be implied that it was . . . to be in some way or other subject to determination," and the confirmation of this by Lord Selborne in the same case in (1875) L.R. 7 H.L. 550, 567: " an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto." It is also stated, and was, of course, accepted by James L.J. and Lord Selborne, that there are a great many contracts of a kind which are clearly intended to be determinable, and the list of well-established exceptions to the suggested general rule had become a formidable one long before the *Martin-Baker* case. The list included contracts of hiring and service, tenancy of land, partnership, agency, licences to enter and occupy land and, at any rate, certain other contracts involving mutual trust and confidence

between the parties. But the general proposition was still emphasised in a manner suggesting that the court should begin with a presumption of permanence in all contracts not falling within the excepted classes.

The defendants in the *Martin-Baker* case strongly urged McNair J. to accept that a presumption of permanence applied to the licence to manufacture, and to find that the presumption could only be rebutted by proof by the plaintiffs that it was essential, in order to give business efficacy to the contract, to imply a term that it should be determinable unilaterally. Far from being essential, they argued, the implication of such a term would stultify the agreement. But McNair J. preferred a different approach to the problem. He was of opinion that the majority of their Lordships in the *Llanelly* case had decided in favour of the permanence of the contract (for running powers over the lines of the Llanelly company) not on the basis of any presumption in favour of permanency, but solely on the terms of the particular agreement and its background of railway legislation. In support of this opinion he cited observations of Lord MacDermott (with whom Viscount Simon and Lord Simonds concurred) and Lord Porter in *Winter Garden Theatre (London), Ltd.* v. *Millennium Productions, Ltd.* [1948] A.C. 173, doubting the generality of the *Llanelly* proposition and stressing that the decision in that case was given on the construction of the document itself. He was also of opinion that the speeches in the *Winter Garden Theatre* case applied to licence agreements generally and not merely to licences for the use of land. "Accordingly," he said, "it appears to me that I have to approach the determination of this question not with any presumption in favour of permanence; and, indeed, if there is any presumption at all, it would seem to me to be a presumption the other way. It is to be borne in mind that this agreement is one in a commercial or mercantile field. No case was cited to me where it has been held that this doctrine of irrevocability applies to a contract in the commercial or mercantile field, and I do not feel that the law merchant would normally look at such an agreement as this as being an agreement intended to constitute permanent relationships." He referred to the basis of reasonableness on which the law merchant had always proceeded in commercial transactions and the incorporation of that basis into codifying statutes such as the Bills of Exchange Act, 1882, and the Sale of Goods Act, 1893. He referred also to *Crediton Gas Co.* v. *Crediton Urban District Council* [1928] Ch. 447 (contract to supply gas for street lighting held revocable) as reinforcing his view that the doctrine of James L.J. and Lord Selborne in the

Llanelly case had no real application to the ordinary commercial contract. Preferring a formula of "construction" rather than "implied term" he came to the conclusion that "the question whether a contract such as this is permanent or revocable does not depend upon the insertion of an implied term, but depends upon the true construction of the language used."

Distinguishing *Re Berker Sportcraft, Ltd.* (1947) 177 L.T. 420 (a licence to make use of designs for garments), in which case the agreement contained express provisions for determination which were construed as excluding a right to determine by notice, McNair J. found that there was nothing inconsistent with revocability in the licence before him and that it could therefore be determined by reasonable notice. The second agreement, which he thought to be more akin to one of service than of agency, was in any case determinable by notice as being within the exceptions to the *Llanelly* proposition, unless the express provision which it contained for summary determination could be construed as excluding termination by notice—which in his opinion it could not.

Presumptions are tiresome things and efforts to make them work invariably end in unprofitable arguments about onus of proof. McNair J.'s approach is welcome: in all indefinite mercantile or commercial contracts the question whether termination can be brought about by reasonable notice or only by mutual consent is one of construction, subject to existing rules of law applicable to certain types of contract. There is no general presumption of permanence. Whether McNair J. was right in saying "the question of length of notice has to be determined having regard to the facts as existing at the time when the notice is given, and is not determined by having regard to the facts as existing at the time when the contract was made," may well be the subject of argument in the future.

F. J. Odgers.

TORT—TRESPASS, NUISANCE, NEGLIGENCE—PLEADING

In *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, the House of Lords reversed the judgment of the Court of Appeal, noted in [1954] C.L.J. 172, and thus restored the judgment of Devlin J. at first instance. Their Lordships were unanimous, but they were unanimous only in deciding to base their judgment upon the insufficiency of a particular set of pleadings. The authority of the case must therefore be regarded as quite exceptionally limited.

It does indeed seem to be true, if the pleadings are examined with a minute care, that the Corporation did not allege simply that Esso had *wrongfully* caused 400 tons of oil to be deposited onto the Corporation's foreshore; instead, they alleged that the said oil became deposited on the said foreshore "owing to the negligent navigation management and control of the said oil tanker by the said second defendant (the master)." It is upon this point that Lord Morton fastened saying (p. 90): "The respondents . . . had pleaded negligence of the master, and trespass and nuisance and damage *resulting from such negligence*; as against the appellants, they chose to rely *only* upon the responsibility of the owners for the master's negligence" (my italics). But the pleader had used the words trespass and nuisance and it does not seem to require special powers of divination to apprehend from the statement of facts that the substance of the Corporation's complaint was the presence of the Esso oil upon the Southport foreshore.

Upon this view of the pleadings the House held that, as it had been proved that the master had not been negligent, judgment must be entered for Esso.

The first moral to be drawn by the student is that in a running down case where his client is injured by a chauffeur-driven car he should continue to use in pleading the barbarous phrase that the defendant owner "wrongfully and/or negligently" caused his client's injuries: for if he gives merely the standard particulars of negligence in respect of the *chauffeur's driving*, according to the *Esso* case judgment will be entered for the defendant should it appear in the course of the hearing that the chauffeur had been alert and that the accident had occurred because, *e.g.*, the brakes of the car had, as the result of defective maintenance, suddenly failed.

The student should also appreciate the degree to which the House has avoided directing its attention to the substantial point at issue. In a situation of fact such as that in the Esso case, the critical question—indeed in practice the only question—is "upon whom does the burden of proof lie?" Must the plaintiff affirm and prove a particular default of the defendant; or must the defendant show that the event occurred without his fault? Argument upon the competence, one hundred years ago, of trespass or nuisance or negligence (if relevant at all) is relevant only as an indirect attempt to answer that question. The attempt, via that route, *is* very indirect; for even if it is concluded that only negligence was available, the doctrine of *res ipsa loquitur* has recently been so extended that the burden of disproof may still fall upon the defendant. The confusion of the discussion in the House of Lords is such that the *Esso* case (in which judgment is ordered to be entered for the

defendant) has already been cited in *Moore* v. *R. Fox & Sons* [1956] 2 W.L.R. 342 (Lord Evershed M.R., p. 350) as authority for casting the burden of disproof upon the defendant and so making him liable.

It would be a great advantage if the Courts ceased to discuss the possible competence in days now bygone of forms of action which no longer exist and turned their mind to the substantial question of the burden of proof. Moreover if cases such as *Sharrod* v. *London & North Western Railway Co.* (1849) 4 Exch. 580 are to be disinterred, an effort should be made to discover what the court deciding such a case conceived itself to be deciding *in the context* in which the case was decided: the attempt directly to apply *Sharrod's* case to the law of master and servant *as it now exists* is calculated to cause the most remarkable complications.

C. J. Hamson.

NEGLIGENCE—ESCAPE OF WATER—RULE IN RYLANDS *v.* FLETCHER

The plaintiffs in *A. Prosser & Sons, Ltd.* v. *Levy and Others* [1955] 1 W.L.R. 1224 were the lessees of the ground floor lock-up shop owned by the defendants, who remained in occupation and control of the passages and lavatories in the building, used in common by the plaintiffs and other tenants. In the passageway of the second floor there was a wash-basin with a small section of redundant $\frac{1}{2}$-inch copper pipe from the main water supply pipe underneath it. This pipe was $3\frac{1}{2}$ inches above floor level; it had a stop tap, but the end was open and there was no waste pipe or drain to carry away water that might flow from it. The defendants let the offices on the first, second and third floors to B. & Co. with rights of passage over common ways to reach their rooms and the right to use the lavatories in common with others, including the plaintiffs. At the date of the lease to B. & Co. the estate agent of the defendants had inspected the property and knew of the existence of the wash-basin and pipe on the second floor. The plaintiffs suffered damage to their goods when, in circumstances unknown, the stop tap was knocked or turned on and water seeped into their shop.

Havers J. held that the defendants were negligent in not taking steps to prevent the escape of water from the redundant pipe, but he concluded that as the turning on of the stop tap was the deliberate and mischievous act of a stranger and not an accident, the defendants were not liable to the plaintiffs.

The plaintiffs appealed; and the Court of Appeal, in a judgment delivered by Singleton L.J., held that (i) the defendants were

negligent towards the plaintiffs, for the leaving of the redundant pipe in that condition was something which a reasonable man would not do, and the damage to the plaintiffs' goods was damage of a kind which might naturally follow from it; (ii) the plaintiffs could not be taken to have consented impliedly to the installation as it existed; (iii) the defendants had failed to discharge the onus, which was upon them if they were to avoid liability, of showing not merely that the escape of the water was caused by the negligence of a third party over whom they had no control, but that it was due to the act of a subsequent conscious volition, a deliberate and mischievous act; they had not shown this and the finding of the trial judge on this point was not warranted upon the evidence given; (iv) the defendants were therefore liable to the plaintiffs for the damage done. Singleton L.J. after stating the rule in *Rylands* v. *Fletcher* reviews the cases which establish an exception to the rule based upon the consent of the plaintiff. "There are," he states, "two important elements for consideration, namely, negligence and consent. In the case of an ordinary water supply in a block of premises each tenant can normally be regarded as consenting to the presence of water on the premises if the supply is of the usual character. It cannot be said that he consents to it if it is of quite an unusual kind, or is defective or dangerous, unless he knows of that . . . [The plaintiffs] cannot be said to have consented to the set-up or installation as it existed at the time the damage was caused. Over and above this, negligence on the part of the defendants which causes or contributes to the damage takes the case out of the exception to the rule in *Rylands* v. *Fletcher*" (p. 1233). It is well established that consent is a defence in a *Rylands* v. *Fletcher* situation: *Att.-Gen.* v. *Cory Bros., Ltd.* [1921] A.C. 521, 538, 543, 545, 550 (Lords Finlay and Atkinson); *Thomas* v. *Lewis* [1937] 1 All E.R. 137 (quarry blasting); although it does not seem to be available as between a commercial supplier of gas in respect of an explosion of gas mains under the highway, and a consumer on premises adjoining the highway: *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident, Ltd.* [1936] A.C. 108, 120, P.C. (Lord Wright). In *Rickards* v. *Lothian* [1913] A.C. 263, P.C. (no liability where flooding was due to the deliberate stopping up by a stranger of the waterpipe to a basin on an upper floor and the turning on full of the tap), Lord Moulton (at pp. 279–281) said that the case did not come within the principle laid down in *Rylands* v. *Fletcher*, for every use of land does not bring that principle into play ("It must be some special use bringing with it increased danger to others, and must not be the ordinary use of land") and referred to the further expression of this point by

Wright J. in *Blake* v. *Woolf* [1893] 2 Q.B. 426. The Court of Appeal decided in *Collingwood* v. *Home and Colonial Stores, Ltd.* [1936] 3 All E.R. 200 that the doctrine in *Rylands* v. *Fletcher* does not apply to the use of water, gas or electricity for ordinary domestic purposes (as distinguished from the handling of them in bulk in mains or reservoirs), but this decision was not referred to in the instant case. Liability under *Rylands* v. *Fletcher* is independent of negligence. Lord Simon in *Read* v. *Lyons & Co., Ltd.* [1947] A.C. 156, 167 emphasised that one condition declared by the House of Lords to be essential for liability in that case is "non-natural use" of the land, which in some later cases, which did not reach the House, had been otherwise expressed as "exceptional" user, when such user is not regarded as "natural" and at the same time is likely to produce mischief if there is an escape.

It seems, therefore, that the use of water and the defective copper pipe installation can hardly be regarded as a "non-natural use" of land; the quotation from Singleton L.J., above, indicates that he had this in mind, and that liability here was based on the ordinary principles of negligence and not under the stricter doctrine of *Rylands* v. *Fletcher*. The defence of consent failed, for although the plaintiffs had impliedly consented to run the risks incurred in having water laid on in pipes, they could not in the absence of express knowledge be said to have consented to the added danger of having it negligently installed in defective or dangerous pipes.

T. Ellis Lewis.

TORT—CONTRIBUTION BETWEEN CONCURRENT TORTFEASORS

The decision of the House of Lords in *George Wimpey & Co., Ltd.* v. *B.O.A.C.* [1955] A.C. 169 is a depressing example of the darkness that has descended upon the courts in the matter of statutory interpretation. The law as now authoritatively declared is that if a man is injured by the concurrent negligence of two persons, D1 and D2, and sues D2 out of time, his failure in this action prevents D1 from claiming contribution in respect of the damages that D1 remains liable to pay. Unfortunately, the effect of the decision is not confined to the law of limitation of actions. It applies, as Viscount Simonds was at pains to point out, where P's failure against D2 was due to his own inadequate presentation of his case. He may have pleaded badly, or failed to procure the necessary witnesses, and been non-suited. This failure upon the part of P will be visited upon D1, who was not party to the action, and will

prevent D1 from exercising the statutory right of contribution that he would otherwise have had against D2. In effect D1 becomes bound by a judgment *in personam* to which he was neither party nor privy, in contradiction of a well-settled principle of the common law.

It might have been thought that very clear words would be required of a statute to achieve this preposterous result. So far were the words of the Tortfeasors Act from being clear, that not only Denning L.J. in the Court of Appeal (see [1954] C.L.J. 50), but two against three peers in the House of Lords, found themselves able to reach a contrary conclusion. Much of the argument turned upon the meaning of the word "liable," which, together with the word "liability," appears seven times in section 6. As Lord Keith pointed out, the same meaning cannot be attached to the word in all these instances. In the vital phrase in section 6 (1) (*c*) ("who is, or would if sued have been, liable"), the majority chose to construe it in the unusual meaning of "held liable." In its usual meaning, a tortfeasor is "liable" in damages immediately on the commission of the tort, and the words "or would if sued have been" might well have been ignored as maladroit surplusage on the part of the legislature—as it evidently is. Instead, the phrase is held to refer to two distinct and mutually exclusive situations: (i) where D2 has been sued by P and held liable, and (ii) where he has not been sued by P but would have been held liable if sued. This leaves as a *casus omissus* the situation where D2 has been sued by P and held not liable; here the statutory right of contribution does not apply, even in circumstances where it justly ought. The remedial statute is construed *ut res magis pereat quam valeat.*

One is at a loss to know what social purpose is supposed to be served by this kind of interpretation. Certainly it does not represent any intention that Parliament actually had, or would have had if the ruck in the draftsmanship had been called to its attention. Nor does it subserve the great object of the certainty of law, because few lawyers advising on this Act of Parliament would have said with any kind of certainty that it had the effect of penalising a claimant for contribution by a fact over which he had no control—the accident that the injured plaintiff has brought an ill-advised and abortive action. An unreasonable construction of a statute is never to be expected beforehand, if only because there are far more unreasonable constructions latent in a statute than reasonable ones.

One member of the majority put his judgment on a wider ground than that just given. Lord Reid thought that the words

in section 6 (1) (*c*) of the Tortfeasors Act imported a temporal limitation, and that they should be read either as meaning "if sued by the injured plaintiff at the time when he was suing the other tortfeasor [D1] who is now claiming contribution," or alternatively as meaning "if sued by the injured plaintiff at the time when the other tortfeasor [D1] claims contribution." Lord Reid did not find it necessary to decide between the two interpretations, but held that in any event the words did not mean "if sued by the injured plaintiff immediately after the accident."

It is necessary to emphasise that this was a minority view, even though in the result that he reached Lord Reid was one of the majority. The other members of the majority were Lord Tucker and Viscount Simonds. Both took the narrow position that on the facts of the case D2 had actually been sued by P and held not liable (because of the special period of limitation then operative in favour of public authorities). Since he had actually been sued, and held not liable, the hypothetical clause "would if sued have been liable" was inapplicable. This is as far as the actual decision extends. It does not tell us what temporal limitation is to be imported into section 6 (1) (*c*) for the case where D2 has not been sued by P. There are, however, *obiter dicta* on this question, as well as the opinions of the dissenting lords. The dissentients, Lords Porter and Keith, took the view rejected by Lord Reid, namely that the words meant "if sued by the injured plaintiff when his cause of action arose." (It is true that Lord Porter thought it unnecessary to imply temporal words into the statute, but his interpretation of it was as though the words just stated were there.) Of the majority, Viscount Simonds said that he would upon this part of the case accept the conclusion of Lord Reid, but Lord Tucker said that, while he found it unnecessary to express any opinion, he was not to be taken as in any way dissenting from the views expressed in the Court of Appeal. On this division of opinion it can only be said that the wording of the implied temporal limitation remains an open question.

Viscount Simonds' opinion is worth some further analysis. Had D2 never been sued by P, the noble lord seems to have been prepared to uphold the claim for contribution, although the claim was made after P's action was statute-barred. This means that he was prepared to imply "in time" into the phrase "or would if sued have been." The point that immediately strikes one is that on this interpretation the claim should have succeeded on the facts before the House, for the defendant would if sued in time by the injured plaintiff have been liable to him. To this argument the only possible reply is that the defendant does not come within the first

part of the clause; he has not been held liable. But why should this fact destroy the effect of the concluding words? Where the statute provides two alternatives, the inapplicability of the one should not preclude the application of the other.

There is a disturbing passage in the same speech indicating that in Viscount Simonds' opinion it would not be an unreasonable construction of the provision to limit the right of contribution to the case where he who seeks contribution has himself been sued to judgment. On this view, the contribution provisions of the Tortfeasors Act would wholly fail to operate where the claimant for contribution has settled with the injured plaintiff out of court. It would result in yet another situation in which the Act would fail of effect. At common law, a claim for indemnity between joint tortfeasors can be sustained although the claimant has not been sued but has settled out of court (*Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.* [1934] 1 K.B. 191); the contrary rule would be vexatious, because it would require the parties to engage in costly litigation when the question of liability was not in dispute. The doubt as to the present law under the Tortfeasors Act emphasises the need for overhauling our apportionment legislation.

It should be added that much of the practical importance of the matters discussed in *Wimpey's* case has disappeared with the new periods of limitation prescribed by the Law Reform (Limitation of Actions, etc.) Act, 1954. The lengthening of certain time-limits and the removal of the "lop-sided" period of limitation under what used to be the Public Authorities Protection Act, means that injustices are less likely to occur.

GLANVILLE WILLIAMS.

TRUST—COURT'S JURISDICTION TO MODIFY TERMS

Re Simmons, Simmons v. *Public Trustee* [1956] 2 W.L.R. 16 is a sequel to the line of cases which culminated in *Chapman* v. *Chapman* [1954] A.C. 429; noted *ante* [1954] C.L.J. 184–189. In the latter decision, it will be remembered, the House of Lords set a limit to the court's inherent non-statutory jurisdiction to sanction, on behalf of persons under disability or not yet born or ascertained, modifications of the beneficial interests prescribed by a trust. The earlier cases had established, *inter alia*, that the court can so sanction proposed modifications designed to give effect to a *compromise* between the beneficiaries; but the House of Lords decided that this aspect of the jurisdiction exists only where that "compromise" is founded upon some real *dispute* as to the rights

of the beneficiaries *inter se*. To this, a very recent decision of the Court of Appeal—*Re Powell-Cotton's Resettlement* [1956] 1 W.L.R. 23—has added (i) that when a judge refuses to sanction such a compromise the Court of Appeal is reluctant to interfere; (ii) that a doubt as to the true construction of an old-fashioned investment clause is probably not a " dispute " as to the rights of the beneficiaries within the spirit of *Chapman* v. *Chapman*, and probably therefore would not enable the court to authorise the substitution therefor of a modern investment clause. This can be done, however, for *charitable* trusts, since the wide inherent jurisdiction to modify them, by way of scheme, does not presuppose any dispute: *Re Royal Society's Charitable Trusts* [1956] Ch. 87.

Re Simmons, *supra*, was a decision of Danckwerts J. upon the statutory, as opposed to the inherent, jurisdictions of the court in these matters. The House of Lords, in *Chapman* v. *Chapman*, was not concerned with these statutory jurisdictions (see [1954] C.L.J. 188–189). The most notable among them, perhaps, is conferred by section 64 of the Settled Land Act, 1925, whereby the court may empower a tenant for life of settled land to effect any " transaction " which is for the benefit of the settled land or of the persons interested under the settlement. In its second subsection (as amended in 1943) it defined " transaction " very widely, so as to include " . . . any compromise or other dealing, or arrangement." And these wide words have been held, by the Court of Appeal in *Re Downshire Settled Estates* [1953] Ch. 218, 252–260, to enable the court to sanction a rearrangement of beneficial interests, not preceded by any " dispute " as to the rights of the beneficiaries, in order to reduce expected death duties. The tenant for life, who had only a protected life interest, was allowed *inter alia* to surrender his life interest in £700,000 worth of capital money without forfeiting his life interest in £400,000 worth of settled land.

In *Re Simmons* the proposed arrangement was very similar. Some thirty years ago, a settlor had settled her real and personal property upon trusts which, *inter alia*, gave her as to one-third of the property a protected life interest and a testamentary general power of appointment; and there was a gift over, in default of appointment, to beneficiaries some of whom might be unborn or unascertained. In 1955, however, being then sixty-three years of age and still unmarried, she found herself short of capital; she therefore proposed to the court an arrangement for modifying the terms of the trust so that, on providing compensation for such beneficiaries as might suffer thereby, she would receive at once an absolute interest in a certain part of the trust property. It was clear to her advisers that, in view of *Chapman* v. *Chapman*, *supra*,

the court could do nothing for her except in so far as the trust fell within section 64 of the Settled Land Act. Accordingly, her application related only to so much of the trust property as consisted of land. Her settlement, unlike the *Re Downshire* settlement, had settled the land upon trust for sale. Danckwerts J. was thus faced with the problem whether section 64, which speaks of enabling a "tenant for life" to effect transactions concerning "settled land," is available for enabling trustees for sale to effect such transactions concerning land which they are holding on trust for sale. There is no doubt, of course, that the ordinary powers which the Act gives specifically to a tenant for life of settled land are exercisable by trustees for sale; for section 28 (1) of the Law of Property Act, 1925, gives to them "all the powers of a tenant for life . . . under the Settled Land Act"—see *Re Wellsted's Will Trusts* [1949] Ch. 296 (C.A.). Do the words "all the powers of a tenant for life" include even powers which, by virtue of section 64, he cannot have unless he first obtains authority from the court? Danckwerts J. decided that they do. He held accordingly that the court has jurisdiction by virtue of section 64 of the Settled Land Act to authorise even trustees for sale to effect a "compromise or other dealing, or arrangement." And, being of opinion that the proposed arrangement was "for the benefit of . . . the persons interested under the settlement" he authorised the trustees for sale to give effect to it.

S. J. Bailey.

CHARITY—OTHER PURPOSES BENEFICIAL TO THE COMMUNITY—PUBLIC ELEMENT

In *Inland Revenue Commissioners* v. *Baddeley* [1955] A.C. 572, the House of Lords (Lord Reid dissenting) reversed a unanimous decision of the Court of Appeal as to the true construction and effect of certain supposedly charitable trusts. Their Lordships held, applying their earlier decision in *Williams' Trustees* v. *I. R. C.* [1947] A.C. 447 (the case of the Welsh Institute), that the trust purposes were too wide to be charitable in law.

The trust properties were a mission church and lecture room, some land laid out as playing fields and £10,000. The trust purposes, as appeared from two trust deeds, were chiefly the "religious (or moral) social and physical well-being" of persons resident for the time being in certain county boroughs who are or are likely to become members of the Methodist Church and are "of insufficient means otherwise to enjoy the advantages provided by

these presents." Other phrases included "religious services and instruction," and "moral social and physical training and recreation." The House held, nevertheless, that the trusts did not fall within any of the four permitted groups of charity formulated in *Pemsel's Case*. Their Lordships' speeches were directed chiefly to the fourth of these groups: "other purposes beneficial to the community"—as to which it is well settled that "beneficial" means beneficial in a sense compatible with the spirit of the preamble to the old Statute of Elizabeth. The words of the trust evidently contemplated the use of the premises as a kind of social and athletic club. They were thus too wide and too vague to constitute a charity.

From this rather inadequate summary of the facts and the operative *ratio decidendi*, let us turn to what was perhaps the most striking feature of the case. As is well known, the Court of Appeal and the House of Lords have been much engaged recently in developing the *public* element of charitable trusts. They have already achieved a virtually uniform requirement, for charities falling within any of the first three groups formulated in *Pemsel's Case* (poverty, education, religion), to the effect that the trust must be beneficial to the community or to a section of the community; and they have emphasised (as indeed does a recent decision of the Privy Council—*Re Cox* [1955] A.C. 627) that in general a mere personal nexus—as of employment or of family relationship—will not do. The fourth group, "other purposes beneficial to the community," by its very title seems to imply a similar test. One had therefore assumed that for all four groups (with a small anomaly for "poor relations") the required element of public benefit is now the same.

Viscount Simonds and Lord Somervell, however, accepted somewhat surprisingly counsel's contention that the necessary public element in Group IV differs from that which is necessary in the other three groups. Whereas, in those other three groups, it is sufficient that the trust benefits a mere "section" of the public, in Group IV (it was said) the trust must be of general public utility. To be of "general" public utility, it was said, the benefits provided by the trust must be available, directly or indirectly, to all members of the public—or at least to all persons within some sufficient geographical area: in consequence, no trust restricted to Methodists can be a charitable trust within Group IV. The reasoning here was supported by an assumption that Lord Macnaghten's fourth group was intended to comprise the residuary items listed by the Statute of Elizabeth, such as trusts for the repair of bridges, and by the rhetorical question "Who has ever heard of a

bridge to be crossed only by impecunious Methodists? " Nevertheless, it would seem that this rather startling theorem is not yet a settled part of our law; for Lord Reid's opinion was very strongly against it, and Lords Porter and Tucker expressly refrained from expressing any opinion upon it.

S. J. Bailey.

ADMINISTRATION OF ESTATES—INCIDENCE OF PECUNIARY LEGACIES—RELEVANCE OF TRUST FOR SALE

The decisions in *Re Martin* [1955] Ch. 698 and *Re Midgley* [1955] Ch. 576 raise, somewhat tersely, several difficult problems about the incidence of pecuniary legacies. In the latter case, Harman J. purported to follow *Re Martin* and distinguished *Re Beaumont's Will Trusts* [1950] Ch. 462; and yet it is difficult to believe that Danckwerts J., who decided those two cases, would have agreed with his decision. A full account of this topic and its background is to be found in Professor Ryder's article herein (*post*, p. 80). The present is but a brief introductory note upon some aspects of the matter.

The problem is chiefly whether section 34 (3) of the Administration of Estates Act, 1925, together with the relevant schedule, has altered the old rule whereby, before 1926, the burden of pecuniary legacies fell indifferently upon such property (ordinarily only personal property) as had not been specifically devised or bequeathed by the testator's will. Under the old rule, for instance, if one bequeathed one's residuary personalty to A and B in equal shares, the fact that B's share failed—*e.g.*, by lapse or by revocation—did not advantage A. Pecuniary legacies and, in those days, debts fell upon the residue as a whole; and the fact that some or all of that residue was comprised in an effective residuary gift made no difference.

Section 34 (3) of the Act introduced its schedule avowedly in order to prescribe the order in which " debts and liabilities " are to be borne by the items of the deceased's estate. It contains no hint that it seeks to affect the incidence of pecuniary legacies given by his will. And yet, until very recently, it would appear that judges and counsel, accustomed in the past to a single rule which embraced both pecuniary legacies and debts, paid little attention to this new point: and even in the Court of Appeal it seemed to be assumed that some at least of the changes wrought for debts by section 34 (3) and its schedule, apply likewise to pecuniary legacies —see *e.g.*, *Re Worthington* [1933] 1 Ch. 771 and *Re Harland-Peck*

[1941] Ch. 182 (where, at p. 187, there is also a similar error about section 32).

Admittedly, it could be argued that section 34 (3), read in the light of its schedule, was intended to affect *by implication* the impact of pecuniary legacies upon a deceased person's assets; for the schedule, when directing that debts be paid first out of undisposed-of property and next out of property comprised in a residuary gift, requires one first of all to set aside a fund sufficient to meet any pecuniary legacies, and indicates that this fund should come primarily from the undisposed-of property. Nevertheless, in *Re Beaumont*, *supra*, Danckwerts J. held the contrary. He decided that the pecuniary legacies bequeathed by the will there in question fell, as of old, upon the residue as a whole: consequently, although that residue had been bequeathed to A and B equally and B's share had lapsed, they did not fall primarily upon the lapsed (*i.e.*, undisposed-of) share. This is the decision which Harman J. declined to follow in *Re Midgley*, *supra*, where the facts were substantially the same (a share of residue there had been revoked). And the five lines in which he did so, as reported at p. 584, appear to throw little light upon the matter.

Another relevant section of the Act of 1925 is section 33: the section which imposes a trust for sale upon undisposed-of property. That section was irrelevant in both *Re Beaumont* and *Re Midgley*, since in each of them the will itself had imposed a trust for sale upon the residue—see *Re McKee* [1931] 2 Ch. 145 (C.A.). Where, however, the will itself imposes no trust for sale, section 33 implies one and prescribes what is to be done with the proceeds of that sale. What it prescribes (in subsection (2)) is this: first, one is to use these proceeds of sale for paying the debts and, in doing so of course, one must follow the ordinary rules given by section 34 (3) and its schedule; then, having paid the debts, one must "set aside a fund sufficient to provide for any pecuniary legacies given by the will"; and, finally (subsection (4)), one distributes any remaining surplus among the persons beneficially entitled under the intestacy rules. Now this "fund" for pecuniary legacies, unlike that mentioned in the schedule, has clearly nothing to do with paying debts. It is obviously the fund from which the pecuniary legacies are in fact to be paid. There can be no doubt, therefore, when section 33 applies, that a lapsed or revoked share of residue (being technically undisposed of by the will—*Re Tong* [1931] 1 Ch. 202 (C.A.)) is made primarily liable, to the exoneration of other residue, for paying the pecuniary legacies.

In *Re Martin*, *supra*, the testator had revoked, by codicil, a devise of all his real estate but had effectively bequeathed pecuniary

legacies and his residuary personal estate. Section 33 applied to the real estate, since it was undisposed of and the will had not subjected it to a trust for sale. Danckwerts J. held, accordingly, that the pecuniary legacies were payable primarily out of the real estate. In so deciding, he distinguished his earlier decision in *Re Beaumont*, *supra*, both on the obvious ground that in that case the will had imposed upon the undisposed-of share of residue a trust for sale—so excluding section 33—and on the further but more recondite ground for excluding section 33 (derived likewise, it seems, from *Re McKee*, at pp. 160, 165) that in *Re Beaumont* the undisposed-of property was merely a share of a fund which the will had created and not (as here) a particular asset of the testator's.

Thus, when section 33 applies, even undisposed-of realty may become primarily liable to bear any pecuniary legacies; and so, *a fortiori*, may a lapsed or revoked share of residue. Unfortunately, it is not altogether clear from Danckwerts J.'s judgment, how far his decision rested upon section 33 and how far it was assisted by section 34 (3) and its schedule. Each of these prescribes—though, as we have seen, in very different contexts—the setting aside of a "fund" sufficient for the pecuniary legacies. And the tendency of the older dicta (see *e.g.*, the judgments in *Re Worthington*, *supra*) was to speak of both sections in one breath. Danckwerts J., however, began his judgment by emphasising section 33, but in his two final paragraphs seemed surprisingly to lay the emphasis primarily upon section 34 (3) and its schedule. That, presumably, is the reason why, as we have seen, Harman J. purported afterwards to follow this decision, in a case (*Re Midgley*, *supra*) to which section 33 was completely inapplicable.

S. J. Bailey.

EASEMENT—JUS SPATIANDI

The decision of Danckwerts J. in *Re Ellenborough Park*, noted in [1955] C.L.J. 154, that a *jus spatiandi* may validly be created by way of easement, has been affirmed by the Court of Appeal [1955] 3 W.L.R. 892. The judgment of the court, delivered by Lord Evershed M.R., is more elaborate than that of the lower court, but affirms the same principles. The rule that an easement must be reasonably necessary for the enjoyment of the dominant tenement comes under review. There have been a number of decisions that there may be a valid easement to benefit a business conducted upon the dominant tenement, such as *Smith* v. *Gates* [1952] C.P.L. 814 and *Copeland* v. *Greenhalf* [1952] Ch. 488. The court now seeks to

explain why the right to put boats upon the canal in *Hill* v. *Tupper* (1863) 2 H. & C. 121 could nevertheless not qualify as an easement, on the ground that the right had no normal connection with the ordinary use of the dominant tenement, but was merely an independent business enterprise. The primary use of the dominant tenement contemplated at the time of the grant, or in a prescriptive claim the user during the period (see *Smith* v. *Gates*, *supra*), emerges as the test whereby to determine whether the right can be a valid easement, and increased value to the dominant tenement accruing from exercise of the right is not a conclusive factor. But the test laid down by the Court of Appeal actually fits the facts of *Hill* v. *Tupper*, for the property leased to the plaintiff consisted of a small piece of land along with a boathouse, and the plaintiff is described in the various reports as a boat proprietor, a boat-builder and a boatman. It seems probable that a modern court faced for the first time with the facts of *Hill* v. *Tupper* would have no difficulty in upholding the plaintiff's claim to an easement.

In considering whether the right was capable of forming the subject-matter of a grant, the Court of Appeal deny that the right was purely for amusement, and further refuse to regard it as inconsistent with the proprietorship or possession of the servient owners, distinguishing *Copeland* v. *Greenhalf* (*supra*) on the facts.

The passing approval given to Dr. Cheshire's third condition of an easement that the dominant and servient owners must be different persons is to be regretted, as it ignores the important position of the leaseholder in the law of easements.

R. N. Gooderson.

JOINT TENANCY—SEVERANCE—TRUSTEES—DUTY TO INFORM BENEFICIARY OF BENEFITS

Hawksley v. *May* [1955] 3 W.L.R. 569 is reported only regarding concurrent interests and the duties of trustees, but in form it was an action for conspiracy as well as for breach of trust, and was therefore heard in the Queen's Bench Division. Havers J., who already had experience of another division of the High Court, the Probate Division, was called upon to determine questions peculiarly within the province of the Chancery Division, assisted by eight learned counsel of whom only one is in Chancery practice.

The plaintiff Harry and his sister Cicely were entitled to certain funds as joint tenants under a power of appointment exercised in their favour under a settlement of 1893. The defendants were the

trustees of the settlement and their solicitor. The alleged conspiracy was between the defendants and the plaintiff's father (who died in 1948) to conceal from the plaintiff the benefits to which he was entitled under the trust.

The learned judge first held that in the case of a joint tenancy income is severed and held in common as soon as it becomes payable, following *Walmsley* v. *Foxhall* (1870) 40 L.J.Ch. 28. As to capital, his Lordship held that the joint interest was severed by a letter from Cicely to the trustees just after she came of age in February, 1942. This seems to be erroneous first because the letter deals only with dividends, and the court had already held that instalments of income were automatically severed as soon as payable, and secondly because the decision that a joint tenancy can be severed by a mere declaration of intention by one of the co-sharers is contrary to *Partriche* v. *Powlet* (1740) 2 Atk. 54 (Lord Hardwicke); and *Re Wilks* [1891] 3 Ch. 59. Section 36 (2) of the Law of Property Act, 1925, was not in question, as the subject-matter was not land, and the written notice if any was not addressed to the other joint tenant but to the trustees.

The learned judge further decided that there was a severance at any rate when Cicely's share of the trust funds was transferred to her in September, 1942. This also seems to be erroneous. Certainly the unilateral action of the trustees could not effect severance. Even if Cicely demanded her share or gave a receipt for it to the trustees, this could not effect severance without the concurrence of Harry, which was clearly not obtained as he remained in complete ignorance of his rights under the trust. In the case of personal property, apart from alienation of his share by one joint tenant, only a *mutual* agreement or a *mutual* course of dealing could produce severance.

His Lordship's findings on the duties of trustees are upon firmer ground. It was held that on Harry's attaining the age of twenty-one years in 1939 the trustees were bound to pay him his share of the income of the trust funds, and upon severance of the joint tenancy his share of the capital, in each case without any demand by him. It was further held to be the duty of the trustees to disclose to Harry the existence of his interest in the trust fund, though not to expound to him the legal nature of his interest and in particular his right to sever the joint tenancy. This is a welcome decision, and it is gratifying to find *Re Lewis* [1904] 2 Ch. 656 distinguished. The latter case is the climax of a series of decisions that an executor is under no duty to take reasonable care to disclose to a beneficiary a gift in his favour, even where lack of knowledge may involve

failure to fulfil some condition attached to the gift within the time prescribed by the testator. The cases before *Re Lewis* relate to contests between a devisee or legatee subject to a condition, and those entitled under the gift over or to residue, where the executor does not personally benefit by failure to observe the condition. The rationale of such cases is sound: one beneficiary is as privy as the other. But in *Re Lewis* the Court of Appeal held that an executor entitled under the gift over may take advantage of breach of such a condition. This is contrary to the implication in *Lady Anne Fry's Case* (1671) 1 Vent. 199, and in *Chauncy* v. *Graydon* (1743) 2 Atk. 616. *Re Lewis* may be restrictively distinguished as a case where the executor informed the beneficiary of the gift, though not of the condition, but the rule in the United States, laid down in *Morris* v. *Mull*, 144 N.E. 436, that an executor who fails to notify the legatee of such a legacy, where he could have done, is precluded from taking personal advantage of the breach of condition, is much to be preferred. It is also submitted that an executor ought to be liable for breach of duty even where he is disinterested if he could reasonably have informed the beneficiary. Counsel for the beneficiary in *Re Lewis* felt constrained to admit that there was no such duty on an executor unless he benefited, but though the dicta in the earlier cases are clear the contest was between beneficiaries, and the question of the personal liability of the executor was not before the court. Havers J. refused to extend the doctrine to trustees under an express trust, relying upon *Brittlebank* v. *Goodwin* (1868) L.R. 5 Eq. 545, 550, and *Burrows* v. *Walls* (1855) 5 De G.M. & G. 233, 253, and stressing that access to a will was possible but not to a private trust. His Lordship was thus of the opinion that there had been a breach of trust, but that it was not a fraudulent breach, and the plaintiff's claim was therefore barred under section 19 (2) of the Limitation Act, 1939. No evidence of conspiracy was found.

R. N. Gooderson.

Restrictive Covenant—Discharge—Character of Neighbourhood—"Obsolete"

In *Chatsworth Estates Company* v. *Fewell* [1931] 1 Ch. 224, at p. 230, Farwell J. ruled that changes in the character of the neighbourhood would be a good defence to an action for breach of restrictive covenants affecting land only if the changes were such as to "render the covenants valueless, so that an action to enforce them would be unmeritorious, not bona fide at all, and merely

brought for some ulterior purposes." In *Re Truman, Hanbury, Buxton & Co. Ltd.'s Application* [1955] 3 W.L.R. 704 the question was whether this was also the proper test as to when restrictive covenants, due to such changes, become "obsolete" for the purposes of an application for their discharge under section 84 (1) (*a*) of the Law of Property Act, 1925.

That subsection, as amended by the Lands Tribunal Act, 1949, provides, in effect, that the Lands Tribunal may discharge or modify a restrictive covenant affecting the land of an applicant if it is satisfied (a) that by reason of changes in the character of the neighbourhood, or certain other factors, the restriction ought to be deemed "obsolete," or (b) that the persons entitled to the benefit of the restriction have expressly or impliedly agreed, by their acts or omissions, to it being discharged or modified, or (c) that such persons will not be injured by its discharge or modification.

The facts in *Re Truman, Hanbury, Buxton & Co. Ltd.'s Application* were not unusual. In 1898 a considerable estate was laid out in building plots subject to restrictive covenants designed to preserve the residential character of the area. Since 1925, on the frontage of a certain road within the area, a number of shops had been built, some houses had been converted into shops and the restrictions on one plot had been released to permit its use as off-licensed premises, all without objection from the persons entitled to the benefit of the covenants. The applicant brewery company wished to erect a public-house on two plots which it had purchased in that road and to which it hoped to attract persons travelling from Southend to London by car and charabanc. It therefore applied under section 84 (1) for the discharge of the covenants in respect of these plots, alleging that the facts satisfied all three paragraphs of the subsection.

The Lands Tribunal, applying the principle in *Chatsworth Estates Company* v. *Fewell* cited above, was not satisfied that the character of the neighbourhood had changed sufficiently to render the covenants "obsolete" within section 84 (1) (*a*), or that the failure of persons entitled to the benefit of the covenants to object to the erection of the shops amounted to an implied agreement on their part to the discharge of the covenants under section 84 (1) (*b*). Being satisfied, however, that a number of persons entitled to the benefit of the covenants affecting the applicants' land would be gravely injured by their discharge, the Tribunal dismissed the application. The Tribunal considered that the power given by section 84 (1) was discretionary, and stated that, even if the applicants had clearly shown that their case fell within either

paragraph (a) or paragraph (b), the present application would still have been dismissed, in the exercise of that discretion, due to the injury which persons entitled to the benefit of the restrictions would suffer by their discharge.

A case was then stated to the Court of Appeal under section 3 (4) of the Lands Tribunal Act, 1949. The grounds of appeal were that the principle in the *Chatsworth Estates* case (which was not decided under section 84) was the wrong test to apply in interpreting the word "obsolete" in section 84 (1) (*a*), and that, where an applicant plainly brought his case within any *one* of the three paragraphs of section 84 (1), the Tribunal was both bound to grant the application and debarred from considering whether or not the case also fell within either of the other paragraphs. Thus, on this view of the subsection, if the covenants in the present case were "obsolete" within paragraph (a), the Tribunal would be bound to discharge the covenants even though paragraph (c) was not satisfied because discharge would injure persons entitled to the benefit of the covenants.

Romer L.J., with whom Birkett L.J. and the Master of the Rolls briefly concurred, held that restrictive covenants become "obsolete" within the meaning of section 84 (1) (*a*) when the purpose which they were designed to serve can no longer be achieved; as where, for example, an area which was originally intended to be preserved as a residential area has, by gradual changes, finally become substantially a commercial area. In the present case the covenants could not be said to be obsolete in this sense because it was clear that their discharge would seriously injure the interests, not of one or two, but of numerous persons entitled to the benefit of the restrictions. Romer L.J. stated that, although Farwell J.'s test of complete lack of value might be too strict, yet if the original purpose of the covenants can no longer be achieved they can hardly be of value to anyone. The implication is, perhaps, that where a neighbourhood, originally primarily residential, has become primarily commercial in character, restrictive covenants thereby become "obsolete" even though one or two persons might still find it of value to be able to prohibit commercial activities upon land closely adjacent to their own.

This was sufficient to dispose of the appeal and the court offered no opinion on the other grounds of appeal above stated. Yet the three paragraphs of section 84 (1) give power to discharge or modify restrictions on such numerous, varied and yet interdependent grounds that it is hard to resist the conclusion that the power so conferred must involve a considerable discretion. Lastly, it is perhaps worth remarking on the continued efficacy of the

restrictive covenant in this modern age of planning. The applicants had successfully obtained both planning permission for the erection of a public-house and also a justices' full on-licence, but that availed them nothing in view of the covenants.

J. W. A. Thornely.

LANDLORD AND TENANT ACT, 1954—BUSINESS PREMISES—TENANCY AT WILL

Does Part II of the Landlord and Tenant Act, 1954 (which gives security of tenure to business, professional and certain other tenants), apply to tenancies at will? That was the main question which came before the Court of Appeal in *Wheeler* v. *Mercer* [1955] 3 W.L.R. 714.

The defendant was tenant, originally one of two joint tenants for a term of seven years from 1936, and thereafter, until the tenancy was terminated by a notice to quit which expired on September 29, 1953, sole quarterly tenant, of premises which she undoubtedly occupied for the purposes of a "business" within the meaning of section 23 of the Act. In July, 1953, the defendant claimed a new lease under section 5 of the Landlord and Tenant Act, 1927, on the ground that goodwill had become attached to the premises, and she started proceedings in the county court under that section; but those proceedings were adjourned at an early stage in order that the parties might negotiate, and the defendant remained in occupation of the premises pending a settlement of the question. The defendant did not at any time apply for an order for security of tenure under section 5 (13) of the Act of 1927. Had she done so, she would clearly have brought herself within the protection of the Act of 1954, since the transitional provisions of that Act make provision for that exact situation (see Ninth Schedule, paragraph 8). But she did continue to occupy the premises until in April, 1955, the negotiations broke down and the landlord claimed possession. Meanwhile on October 1, 1954, the Landlord and Tenant Act, 1954, came into force and the goodwill provisions of the Landlord and Tenant Act, 1927, were repealed.

In these circumstances the Court of Appeal unanimously affirmed the decision of the county court judge that after the termination of her quarterly tenancy the defendant was a tenant at will. She was more than a mere licensee: and she was not a tenant at sufferance since she held over with, not without, the consent of the landlord. She was "a tenant whose lease has

expired, who has been permitted to continue in possession pending a treaty for a new lease " (*per* Hodson L.J. at p. 719).

But was she protected by the Act of 1954? The answer to this question turned upon the true construction of section 25. The expression " tenancy created by a tenancy agreement " in the definition of " tenancy " (s. 69 (1)) is clearly wide enough to include tenancies at will, which are not among the tenancies excluded from Part II by section 43; and a tenancy to which Part II of the Act applies can only be terminated by the landlord by means of a notice which complies with section 25. It was argued, however, that section 25, when read as a whole, limits the application of Part II of the Act to tenancies which could have been brought to an end, apart from the Act, by notice to quit and tenancies which would have come to an end, apart from the Act, by effluxion of time. Section 25 (3) provides that a notice under section 25 shall not terminate a tenancy earlier than the earliest date upon which it might have been terminated by a landlord's " notice to quit," that is to say " a notice to terminate a tenancy given in accordance with the provisions of that tenancy " (s. 69 (1)); and section 25 (4) provides that " in the case of any other tenancy " the tenancy shall not be brought to an end earlier than the date upon which it would have come to an end by effluxion of time. Denning and Morris L.JJ. considered that although the draftsman of the Act may well have had in mind only periodic tenancies and tenancies for a term of years when drafting section 25 (3) and (4), there is nothing in those subsections strong enough to take tenancies at will out of either the definition of " tenancy " or section 25 (1) and (2). The object of section 25 (3) and (4), in the view of Denning L.J., is confined to making it clear that tenancies cannot be brought to an end under section 25 before the common law time (p. 718). Hodson L.J. reached the same result by a slightly different route. He relied strongly on the words " In the case of any other tenancy " in section 25 (4), which he construed as meaning any tenancy (including a tenancy at will) not governed by section 25 (3). Upon that construction tenancies at will of business premises are " left in the air " by section 25 (4), but they can still only be terminated by not more than twelve nor less than six months' notice under section 25 (2).

This raises a further question. Can a purchaser of business premises who is allowed to take possession of the premises under a contract of sale claim the protection of the Act if the sale goes off? More than a century ago such a purchaser was commonly held to be a tenant at will. The relevant authorities on this point are cited in an article by Professor A. D. Hargreaves (69 L.Q.R. 466) in

which he argues that despite *Errington* v. *Errington* [1952] 1 K.B. 290 they are still good law. It has been said, however, that it is not the agreement to purchase, but the letting into possession, that creates such a tenancy: *Doe* d. *Gray* v. *Stanion* (1836) 1 M. & W. 695, 700: see also 69 L.Q.R. 468. In *Wheeler* v. *Mercer* Hodson L.J. found it unnecessary to express any opinion on the question whether such a purchaser can still be regarded as a tenant at will and Morris L.J. did not mention the point. Denning L.J., however, thought that such a purchaser is not entitled to the benefit of the Act "for the simple reason that he is not a tenant at will at all: see *Errington* v. *Errington and Woods*." And he continued: "In any case such a person does not hold under a 'tenancy agreement' within the definition contained in section 69 of the Act" (p. 719). But *Wheeler* v. *Mercer* did not decide this point. What it did decide is that a tenancy at will of business premises, which is created by a tenancy agreement within the meaning of the Act, is a tenancy to which Part II of the Landlord and Tenant Act, 1954, applies.

D. Macintyre.

LANDLORD AND TENANT—RENT RESTRICTION—REPAIRS OR IMPROVEMENTS?

Section 2 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that where a landlord incurs "expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs)" he may, subject to a right of the tenant to have the increase reduced on the ground that the expenditure was unnecessary, increase the annual rent of the dwelling-house by an amount not exceeding eight per cent. of the amount of that expenditure.

In *Morcom* v. *Campbell-Johnson* [1956] 1 Q.B. 106 the landlords of a block of flats, all of which were subject to the Rent Restrictions Acts, (1) replaced an old-fashioned and worn out "two pipe" drainage system by a modern "one pipe" system, and (2) replaced the original cold water system, which had also come to the end of its life, by a more suitable modern substitute; and they also (3) lowered the area adjacent to the flats, which had originally been built above the level of the damp course, in order to bring it below the damp course. The landlords claimed that all these three items of work were "improvements of the dwelling-houses" within the meaning of section 2 (1) (*a*). The tenants contended that the first two items were not "improvements" at

all but " repairs "; and that the third item, although it might be an " improvement," was not an " improvement of the dwelling-houses," since the work was done off the premises.

The obvious difficulty of distinguishing between " repairs " and " improvements " in a particular case is enhanced by the fact that most repairs to a dwelling-house involve the renewal or replacement of parts of the house, so that in one sense a house is almost always improved after it has been repaired. Hitherto the question has been treated as one of degree. On the one hand what is undoubtedly repair may involve some degree of improvement, in the sense of the modern substitute being better than that which has gone before; but on the other hand what is clearly an improvement may also involve restoration. " Between these two extremes," said Evershed M.R. in *Wates* v. *Rowland* [1952] 2 Q.B. 12, 23, " it seems to me to be largely a matter of degree, which in the ordinary case the county court judge could decide as a matter of fact, applying a common-sense man-of-the-world view." Thus in *Strood Estates Ltd.* v. *Gregory* [1936] 2 K.B. 605, replacement of an old-fashioned earth privy by a modern water closet was held to be an improvement. But in *Wates* v. *Rowland* the replacement of an old wooden floor by a new tiled floor of better quality was held to be a repair; although in the same case the raising of the level of the floor, in order to avoid damp, by the insertion of nine new inches of concrete was held to be an improvement, even though the work was done as a result of a notice to abate a nuisance served by the local sanitary inspector.

In *Morcom* v. *Campbell-Johnson* the Court of Appeal attempted to extract some general principles from the previous decisions and in particular from *Wates* v. *Rowland*. The main test, in the view of both Denning L.J. and Hodson L.J., is whether the work done is the provision of something new for the benefit of the occupier or the replacement of something which was already there (pp. 115, 118). If it is merely the replacement of something which was there before, then it is a repair, even though something old-fashioned has been replaced by a more modern equivalent. Hodson L.J. thought it plain that, since the Act contemplates a receipt of rent by the landlord in respect of an improvement, the question whether or not anything is an improvement must be approached objectively from the point of view of a reasonable tenant (p. 120). Morris L.J., however, whilst recognising that if the view of a tenant is to be considered at all, it must be that of a reasonable, not of any particular, tenant, thought that the real inquiry must always be to ascertain the true facts as to whether or not there has been an " improvement " (p. 122). The

ultimate question, in his view, is whether the work is in substance work of repair, even though that repair involves some degree of improvement and even though the modern substitute may be better than what went before (p. 124).

Applying these tests, the first two items of work in *Morcom* v. *Campbell-Johnson* were clearly "repairs." With regard to the third item the court held that upon the facts of this particular case the lowering of the area was not an improvement of any of the flats. They did not, however, go so far as to accept the argument of counsel for the tenant that an "improvement of the dwelling-house" must be executed on the site of the dwelling-house itself. Indeed both Denning L.J. and Hodson L.J. indicated strongly that there may well be circumstances in which the courts might come to a contrary conclusion. Apportionment of the expenditure amongst a number of dwelling-houses might then give rise to problems, for which there is no statutory provision: but in the view of Denning L.J. such problems would not be insoluble. But this whole question remains open.

The importance of *Morcom* v. *Campbell-Johnson* lies in the light it sheds upon the distinction between "repairs" and "improvements" for the purposes of the Rent Restrictions Acts, and perhaps for other purposes too.

D. Macintyre.

Mortmain—Lease—Crown's Right of Forfeiture

It seems from *Attorney-General* v. *Parsons* [1956] 2 W.L.R. 153 (H.L.) that the Mortmain and Charitable Uses Act, 1888, is more fertile of ambiguity than its predecessor by six centuries, the Statute *De Viris Religiosis*, 1279. At any rate, if a report reaches that part of the Elysian fields reserved for departed parliamentary draftsmen, the author of the text of 1279 can congratulate himself on having given much the clearer indication that, upon an alienation of land into mortmain without licence, the Crown's right of forfeiture is a right of entry only, and that there is no forfeiture unless and until the Crown (or some mesne lord) elects to enter. Whether this principle had been altered by the Act of 1888 ("An Act to consolidate and amend the law") was the principal question debated by the House of Lords, although several other difficult questions arose as to the position of leaseholds in the law of mortmain. With one dissentient their Lordships held that the Act of 1888 made no change in the nature of the forfeiture. In the

previous two years the Court of Appeal had three times, and unanimously, held the contrary.

This small fountain of litigation suddenly began to flow because, in the words of Lord Evershed M.R. ([1955] 3 W.L.R. at p. 31), " some few years ago ingenious persons conceived the idea of transferring, or purporting to transfer, the unexpired residues of terms of years in residential property in London to companies incorporated in Eire, which companies had neither a licence to hold land in England nor had they availed themselves of the appropriate provisions of the Companies Act, 1948, as to registration, which would have enabled them to do so." This experiment had several interesting results. It was first held that the assignee company in Eire could not enforce the forfeiture clause in the lease against sub-tenants, since the assignment brought about an immediate forfeiture to the Crown (*Morelle Ltd.* v. *Waterworth* [1955] 1 Q.B. 1), and that it made no difference if the title to the lease was registered: *Rodnall Ltd.* v. *Ludbrook* [1955] 1 Q.B. 1, as explained in *Morelle Ltd.* v. *Wakeling* [1955] 2 Q.B. 379. This last case, decided by a full Court of Appeal of five, also determined that the assignee company could not sue for rent. The Attorney-General had appeared before the Court of Appeal as *amicus curiae*, but leave to join the Crown as a party was refused. *Attorney-General* v. *Parsons* was therefore the first of this series of cases in which the Crown was able to participate properly—and in fact it was the Attorney-General who instituted the proceedings, in order to settle the question whether the Crown became liable on the covenants of leases forfeited under the law of mortmain. But by the time this important point was raised the Court of Appeal had already decided the two crucial principles (that an assignment of the tail-end of a lease was an assurance in mortmain, and that forfeiture was automatic) adversely to the Crown, and the court could not shrink from the logical corollary that the Crown became liable on the covenants.

Thus, by adroit use of the law of mortmain, the Crown could be made a dumping-ground for the onerous remnants of long leases: all that was necessary was to form a foreign company and assign the lease to it. The Court of Appeal's decision that forfeiture was automatic precluded any right of disclaimer by the Crown, or any argument that the Crown could not become liable until it had entered upon the land. The Crown could hardly be expected to tolerate this state of affairs. If it had not now been rescued from it by the House of Lords it would no doubt have had recourse to the legislature.

The lease in question, which had been granted for 99 years

from 1858, had less than five years to run when in 1953 it was assigned to the Irish company. The first question therefore was whether the assignment of so short a "fag-end" was within the prohibition of the Act of 1888 that "Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain . . ." It was quite clear that the assignment was an "assurance" of "land" within the Act, but was it an assurance "in mortmain"? That vital term is nowhere defined, and in that respect the Act of 1888 is no advance upon the old statute of 1279 which prohibited alienations by sale, or "under the colour of gift or lease . . . whereby such lands or tenements may any wise come into mortmain." But the conspicuous absence of definition in the Act of 1888 is at least a strong indication that it was intended to make no change in the meaning of "mortmain." Although the position of leaseholds under the previous law was certainly hazy, there is no doubt that the consensus of authority was in favour of allowing corporations to hold relatively short terms—as for twenty, thirty or forty years—without licence in mortmain, on the ground that they were not within the mischief forbidden by the old statute. After the law of mortmain had lost its original feudal purpose (preservation of the valuable incidents of tenure which a lord could take on the death of his tenant) it tended to justify its existence as an additional prop to the law's various bulwarks against perpetuities and perpetual trusts.

This viewpoint, aided by the ancient prohibition of mortmain "under colour of" a lease, led to the distinction between short and long terms, and to the remark of Wills J. in *Truro Corporation* v. *Rowe* [1901] 2 K.B. 870 at 875 that "The Statutes of Mortmain appear to me to have nothing to do with a short lease of fourteen years."

Nevertheless the Court of Appeal is now firmly committed to the view that the grant or assignment of a lease, however short, may be alienation in mortmain. This view is on the whole confirmed by the House of Lords, for Lords Morton of Henryton and Cohen so held expressly, and Lord Jowitt so assumed without deciding; only Lord MacDermott upheld the opinion that short terms are exonerated.

Assuming therefore that the transaction was caught by the Act, the next question was whether the lease vested automatically in the Crown, or only after the Crown had exercised its right of entry. If the latter, the Crown could escape having embarrassing privileges thrust upon it: by declining to enter it could in effect disclaim. There is general agreement that this would have been possible before 1888, for (as already noted) the statute of 1279

spoke clearly. It forbad alienation of lands in mortmain "under pain of forfeiture of the same," and then provided that in case of transgression "It shall be lawful to us and other chief lords of the fee immediate to enter into the land so aliened . . ." There could be no doubt that the Crown was thus given a right of entry, *i.e.*, a power to enter or not at its option; though it was provided by the Queen's Remembrancer Act, 1859, that the Crown might enforce its rights "without any inquisition being taken or office found or any actual re-entry being made on the premises." But in the Act of 1888 the draftsman described the penalty in new language, which left its nature obscure. He provided that "if any land is so assured . . . the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly." Was this more than a mere translation of the statute of 1279? The similarity was so close that the courts might well have approached the later Act with the presumption that it made no radical alteration in the law. But the Court of Appeal's approach was just the opposite, and in the first *Morelle* case Denning L.J. said: "In the old days the forfeiture was not automatic, but under the wording of the statute (*sc.* of 1888) it is quite clear that the forfeiture is 'from the date of the assurance,' so that it operates at once without any entry by the Crown." The Court of Appeal was thereafter bound by this opinion, and it was also favoured by Lord Morton of Henryton (dissenting) in *Attorney-General* v. *Parsons*, who went so far as to say "in my opinion these words are unambiguous." Yet the majority of the House felt equally clear that the wording of 1888 was perfectly explicable on the footing that there was no change in the nature of the Crown's right of entry, and that no such change was intended by the legislature. If it may be said with great respect, this interpretation seems much the easier, quite apart from the advantage that it avoids making the Crown an unwilling assignee of onerous leases. It might have been further buttressed by reference to the law's general dislike of automatic forfeitures and penalties, of which the rules for conditions subsequent provide many examples; there is no reason why this principle should not assist in statutory interpretation, as no doubt it has done in cases where "void" has been construed as "voidable," *e.g.*, *Re Carter and Kenderdine's Contract* [1897] 1 Ch. 777. It is much less of a stretch of words to hold "forfeited" to mean "liable to be forfeited," particularly in view of the corresponding phrase "under pain of forfeiture" in the version of 1279. Thus from all points of view it is comforting that their Lordships have found that the new bottle contains the old wine.

Lord Jowitt and Lord Morton of Henryton expressed opposite opinions on the question whether the Crown's right of forfeiture is defeated, in the case of registered land, by section 23 of the Land Registration Act, 1925. The negative answer given by the Court of Appeal therefore still stands, but there is at least some sign that its foundations may not be secure.

For a fuller discussion the reader may be referred to Mr. A. J. Bland's instructive article in (1955) 71 L.Q.R. 79.

H. W. R. Wade.

THE RATCLIFFE MURDERS [1]

L. Radzinowicz

Bloodshed in Wapping

On Saturday, December 7, 1811, shortly before midnight, Mr. Marr, a respectable linen draper, closed his shop at 29, Ratcliffe Highway, in Wapping, East London, and with his young assistant began to replace on the shelves the goods which had been displayed for sale during the day. The household consisted of Mr. Marr, his wife and child, the shop-boy and a maidservant. At about twelve o'clock he sent the maid to a nearby shop to buy oysters for supper. She left the door open but on returning she found it closed and rang the bell. She rang again, but there was no reply. Joined by a watchman an hour later, they both rang and knocked until a neighbour, noticing that the yard door was open, leapt over the fence and entered the house. There he saw a terrible scene. Marr and his assistant lay in the shop, dead, with fractured skulls; Mrs. Marr's body was in the passage, also battered about the head, and the child had been murdered in its cradle. The ripping chisel of a ship's carpenter and a maul were found lying near Marr; bloodstains reddened them and spattered the window. No property had been stolen: indeed about one hundred and sixty pounds in cash and notes were found in the house.[2]

The funeral of the murdered family took place on December 15 at the church of St. George in the East, when, in the presence of a great crowd, their bodies were interred in one grave; the shop-boy was buried by his friends. That the crime should have produced horror was only natural. It was, according to one witness, "as sanguinary a one as any that has occurred in the annals of History," [3] while in the words of a neighbour "the late ferocious and horrid massacres plainly indicate that among us are Monsters, not to be surpassed even by the most barbarous Nations." [4]

[1] This article forms a chapter in the forthcoming third volume of the *History of English Criminal Law and its Administration.*

[2] See Fairburn, *Account of the Dreadful Murder of Mr. Marr and Family, etc.* (4th ed., n.d.), p. 6.

[3] Mr. Johnson (of Fenchurch Street) in a letter to R. Ryder (Secretary of State for the Home Department), Dec. 20, 1811, in H.O. 42/118.

[4] Extract from a handbill announcing a meeting of the inhabitants of Long Alley and the adjacent places, in a letter from Joseph Moser to J. Beckett (Home Office), Jan. 1, 1812, in H.O. 42/119.

Public horror had hardly subsided when on the night of Thursday, December 19, the neighbourhood of New Gravel Lane, near Ratcliffe Highway and not far from St. George's Church, was thrown into a state of wild alarm by loud cries of "Murder!" coming from the King's Arms, a public-house situated at no. 81. A man, almost naked, was seen descending from the second floor window by means of two sheets tied together, crying as he lowered himself "They are murdering the people in the house": this was John Turner, a carpenter, lodging at the inn. When a constable and several neighbours gathered at the cries they first came upon the body of Mr. Williamson, the seventy-two-year-old proprietor, who for fifteen years had kept the King's Arms: his throat was horribly cut, one leg was broken and his skull severely fractured, while an iron crowbar or maul was lying at his side. In the parlour they discovered the body of Mrs. Williamson, also with a fractured skull and a cut throat; a little farther away was the body of the maidservant, similarly mutilated.[5]

"All Wapping was immediately in an uproar. The drums of the volunteers beat to arms, the fire-bells were rung, and every person flew in consternation to the spot. The Police searched every house around and every boat in the River, while every cart, waggon, and carriage was stopped."[6] The Thames magistrates circulated descriptions of Mr. Williamson's watch which was believed to have been taken by the murderers.[7] Seven murders accompanied by dreadful circumstances had been committed in the same neighbourhood in less than a fortnight. The magistrates of the Thames Office observed that "the murder of three people in a house in the Gravel Lane last night gives an appearance of a gang acting on a system."[8] The next day a magistrate wrote from the Shadwell Office that "there is every reason to suppose the murderers of Mr. Marr's family are the perpetrators of this atrocious act also."[9]

By this time the horror and alarm had already spread beyond the neighbourhood, beyond the Metropolis and even to distant towns. On December 20 the Home Secretary had been informed

[5] See Camden Pelham, *The Chronicles of Crime, etc.* (1841), vol. 1, pp. 515–516; A. Knapp and W. Baldwin, *Newgate Calendar* (1826), vol. 4, p. 52; *New Newgate Calendar*, vol. 5, p. 371. See also the letter of R. Capper (a magistrate of Shadwell) to J. Beckett, Dec. 21, 1811, in H.O. 42/118.

[6] See "Collection of Newspaper Cuttings," f. 45 (British Museum), "More Murders," Dec. 22, 1811, Wapping.

[7] See letter from the magistrates, Thames Police Office, to J. Beckett, Dec. 24, 1811, in H.O. 42/118.

[8] See letter from the Thames magistrates to the Lambeth Street magistrates, Dec. 20. 1811, in "Book of Letters," 1811–1819, preserved at the Thames Police Office.

[9] See letter from R. Capper to J. Beckett, Dec. 21, 1811, in H.O. 42/118.

that "it is almost impossible to conceive the [effect of] fear and dismay these dreadful occurrences have made on the public, particularly those at the east end of the town." [10] On the same day he had received a further communication that "the almost unheard of murders has [*sic*] caused a general Alarm not only throughout the City but throughout the Country." [11] Somewhat later a letter reached him from Birmingham suggesting means "to put an effectual stop to all such Murders as those of Mr. Marr and Mr. Williamson." [12]

The public tension communicated itself to the authorities.[13] They were desperately anxious to bring the criminal, or criminals, to justice at once. "Minds of the people here are in a state of very considerable apprehension and alarm in consequence of the late horrid transactions" notes an officer from Shoreditch to Beckett, who was then Permanent Under-Secretary of State; "cannot go out of doors," he added, "but I am assailed with enquiries whether the murderers are taken." [14] John Harriott, who was then a magistrate at the Thames Police Office, asked Beckett to inform "Mr. Secretary Ryder [that he] may be assured that no means in our power will be neglected to discover such inhuman Murderers." [15]

The brutality of the Marr outrage roused the parish of St. George to offer fifty pounds reward, to be paid on conviction of the murderers to any who might help to bring them to justice. On December 12 the Government itself offered, over the signature of Ryder, a reward of one hundred pounds, to be paid by the Lords Commissioners of the Treasury, on the conviction of any one or more of the murderers, to anyone, except the person or persons who actually committed the crime, who should disclose one or more accomplices. Two days later, by another proclamation, the reward was raised to five hundred pounds. Several other rewards were offered independently. At one stage John Harriott, on his own initiative, went so far as to name a price for information leading to the arrest of three persons of suspicious appearance who had been seen to stare into Marr's shop before the murder. He

[10] See letter from Mr. Johnson (of Fenchurch Street) to R. Ryder, Dec. 20, 1811, in H.O. 42/118.

[11] Letter from Mr. Lovegrove (of Wallingford) to R. Ryder, Dec. 20, 1811, in H.O. 42/118.

[12] Letter from Mr. Cook (of Birmingham) to R. Ryder, Dec. 23, 1811, in H.O. 42/118.

[13] "Letters have been received," stated the magistrates, "from various and distant parts shewing the great anxiety of the public mind"; see letter from the Thames Police Office to J. Beckett, Dec. 18, 1811, in H.O. 42/118.

[14] See letter from J. Moser to J. Beckett (with returns for the watch of Shoreditch), Dec. 25, 1811, in H.O. 42/118.

[15] See letter from J. Harriott to J. Beckett, Dec. 8, 1811, in H.O. 42/118.

was reprimanded by the Home Office for having acted without their authorisation, and he wrote a letter of apology, promising that "for the future I will take special care to keep my zeal within proper bounds." [16] When Williamson's family met with the same awful fate as Marr's, another reward was offered, again on Ryder's authority. This time a hundred and twenty guineas were advertised: twenty to go to anyone who could prove to whom the ripping chisel or crowbar found near the body of Williamson had been sold,[17] and a further hundred on conviction of the murderer.

The Shadwell Police Office was primarily in charge of the investigations, but several magistrates from other offices also took an active part in them, assisted by their police officers from different units. Aaron Graham of Bow Street, the Thames magistrates, including the indefatigable John Harriott, and the Lambeth Street magistrates were all busy; so were a few Bow Street runners, and even the Bow Street Patrol.[18] Yet they seemed to be making no progress whatever, though they themselves as well as the Home Office were incessantly receiving various "clues and hints." "The whole day has been employed," the magistrates informed the Home Office, "examining men brought to this office on different suspicions." Of one, "suspicion [was] rather strong," and he was to be examined that evening.[19]

During the first wave of panic there was a widespread belief that the multiple murder had been committed by foreigners. Foreign seamen were a continual source of friction, especially as their number was increasing considerably.[20] On December 23

[16] Letter from J. Harriott to the Home Office, Dec. 8, 1811, in "Book of Letters," 1804–1822.

[17] See Fairburn, *Account of the Dreadful Murder of Mr. Marr*, pp. 12 and 18–21. See also a letter from J. Harriott to J. Beckett, Dec. 16, 1811, and from E. Markland (magistrate of Shadwell) to J. Beckett, Dec. 21, 1811, both in H.O. 42/118.

[18] On December 20, 1811, the Thames magistrates sent the following note to the Lambeth Street magistrates: "The Magistrates of the Thames Police present their compliments to the Magistrates of Lambeth Street requesting their meeting them at the Thames Police Office this day at 2 o'clock to consult together on the most effectual measures for discovering the atrocious midnight murderers that infest the neighbourhood of their respective Offices, which from the murder of three people in a house in the Gravel Lane last night gives an appearance of a gang acting on system." A similar note was also sent to the magistrates at Shadwell Office; see "Book of Letters," 1811–1819.

[19] Letter from E. Markland to J. Beckett, 7 o'clock, Dec. 24, 1811, in H.O. 42/118.

[20] In 1811 representations were made to Ryder that brawls were continually taking place between the English and Portuguese sailors at Wapping and in the neighbourhood of the West and East India Docks, and he asked that steps might be taken to put a stop to them before they produced "most fatal effects"; letter from the Home Office to the magistrates of Thames, Whitechapel and Shadwell Offices, Oct. 10, 1811, in H.O. 65/2. But the same state of affairs seemed to continue. In 1814 the commander-in-chief was asked to

Ryder received an anonymous letter in which it was stated that "the nature of these atrocious murders" pointed to their being the work of foreigners, and it was strongly urged that a statement about the murders and a proclamation by the Regent should be translated into Portuguese, "Oriental" and other foreign languages and put up in public-houses, shops and on vessels in the Thames.[1] Earlier in the quest Harriott had informed Beckett that he had found three Portuguese sailors near the place of the Marr murders, with blood on their trousers, and had charged them, but they had proved that they had only come up from Gravesend at about 4 o'clock.[2] The Portuguese consul was obviously relieved. On January 2, having just been informed that the magistrates had "abandoned all suspicions" regarding the three Portuguese sailors who had been thought to be implicated "in the late horrid murders,"[3] he sent a private note to Ryder to express his satisfaction. Some foreign ships were also inspected, but with no result.

The Irish were the next to come under suspicion. Several were examined and a few even detained. One, Cornelius Driscoll by name, was unfortunate enough to be a neighbour of the Williamsons; moreover, he was taken with a gallon bottle of brandy under his coat and "he not accounting for it to our satisfaction . . . from his strange prevarications we were induced to have his house searched." There a pair of linen trousers were found under his bed, wet as if newly washed, and very bloodstained.[4] "When those horrible atrocities were first committed in the neighbourhood of Shadwell," commented Sheridan sarcastically in the House of Commons, "they all remembered how eager vulgar prejudice was to fasten upon a foreigner—people grew all of a sudden thoroughly persuaded that there was evidence upon the face of those murders to show that they were perpetrated by Portuguese, and by none but Portuguese. 'Oh! who would do it but Portuguese?' was the general cry. Prejudice, however, did not long stand still upon the Portuguese. The next tribe of foreigners arraigned and convicted

give the necessary authority for troops from the Tower to be ready to intervene, since serious disturbances had broken out between British and foreign seamen. In 1815 sailors assembled in large numbers and protested against the employment of foreigners on ships, and the Shadwell Office was authorised by the Home Office to ask for help from the Thames Police Office if necessary. A few months later serious trouble was expected at the docks for the same reason and the magistrates of Whitechapel and Thames Offices were instructed to direct an adequate force to the dock area. See letter from the Home Office to the Shadwell Office, July 28, 1815, in H.O. 65/2, and one to the magistrates of Whitechapel and Thames Offices, Sept. 18, 1815, *ibid.*

1 Anonymous letter to R. Ryder (from Pentonville), Dec. 23, 1811, in H.O. 42/118.

2 Letter from J. Harriott to J. Beckett, Dec. 8, 1811, in H.O. 42/118.

3 Letter from the Portuguese consul to R. Ryder (marked private), Jan. 2, 1812, in H.O. 42/119.

4 Letter from E. Markland to J. Beckett, Dec. 21, 1811, in H.O. 42/118.

were the Irish—it was nothing but an Irish murder, and could have been done only by Irishmen!" [5]

The authorities certainly needed no stimulus to pursue their inquiries with vigilance and zeal, but they were constantly receiving fresh hints from all over the country. A man boasted in the Angel public-house, Tothill Street, that he had been concerned in the murder of the Marr family "all except the child," but when he was arrested he denied the truth of the story, which he said was the result of drink. He was detained nevertheless pending inquiries into his whereabouts at the time of the crime: though he was the son of a freeholder, he appeared "to be a profligate character." [6] But it was to the Home Secretary himself that a certain Jacob Gale communicated his observations: apparently he had seen, in a public-house, some persons of odd behaviour and "downcast looks, frequently winking, etc., at each other and all of a sudden went off." He followed, but lost track of them and quite naturally was afraid "of hearing of further Horrid Depredations committed by them." [7] John Clarke enclosed a newspaper cutting of a man who had hanged himself in Hertford gaol and implored Ryder that the body should not be buried at once, suggesting that it should be moved with great care, the features carefully preserved, and people asked to try to recognise him and give any information they could of his companions in life.[8] Thus hints and suggestions were made: "letters have been received from various distant parts," but "nothing traceable has yet occurred." [9] At one stage Marr's brother was strongly suspected and was subjected to a long examination, but was subsequently released.

It cannot be denied that arrests were made in a somewhat indiscriminate manner, and often on unjustifiable grounds. Sir Samuel Romilly described it as "a most monstrous evil, that so many persons had been taken up on that occasion, upon such slight grounds of suspicion." According to him, "one way and

[5] *Parl. Deb.* (1812), vol. 21, cols. 215–216. He also censured the Shadwell magistrates for conduct of which, however, according to the evidence, they were not guilty, namely, that they "were not ashamed to act up to it in all the meanness and bigotry of its indignant spirit, viewing the murder in no less a light than that of a Popish plot. They commenced an indiscriminate hunt after the Irish people; and when they had them before them, in order to come at once to the plot, they began with the deep leader of 'Are you a Papist?' or 'If you deny that you are, show that you don't know how to cross yourself'"; *ibid.*, col. 216.

[6] Letter from Patrick Colquhoun, Queen Square Police Office, to J. Beckett, Dec. 16, 1811, in H.O. 42/118.

[7] Letter from D. Crokard and Jacob Gale (of Devizes) to R. Ryder, Dec. 28, 1811, in H.O. 42/118.

[8] Letter from John Clarke to R. Ryder, Dec. 25, 1811, in H.O. 42/118.

[9] Report from the Thames Police Office to J. Beckett, Dec. 18, 1811, in H.O. 42/118.

another no less than forty or fifty persons had been apprehended on bare suspicion." [10] Then, suddenly, at a time when gloom was at its deepest, and it was said that " all ordinary methods have failed and . . . will fail," the authorities received some vital information from John Petersen, a Dane, as a result of which a certain John Williams [11] was taken to the house of correction in Cold Bath Fields for examination. Williams was a lodger at the Pear Tree, a public-house in Wapping, where he shared a room with two other men, Cutburn and Harris. The latter had read in the newspapers a description of the maul found at Marr's house and had recognised it as the property of Petersen, the Dane, who was an occasional lodger at the Pear Tree, and who, when visiting Denmark, had left it, together with other tools, in the care of Vermillee, the landlord. Harris, to confirm his suspicions, had looked for the maul but had been unable to find it. Then through Vermillee he passed his clues on to the magistrates. Straightway Harriott had the tool examined and discovered the initials " J.P." punched on it; when Williams returned to his lodgings he was arrested. At this point other incriminating evidence came to light, including a bloodstained knife which was found in his waistcoat. Nevertheless, the authorities were still urged not to relax their efforts, and to make certain beyond all doubt that others besides him had not been concerned in the crime.[12]

It had been decided to examine Williams again before committing him for trial, but when the turnkeys entered his cell on December 27, they found him hanging there, dead.[13] He was without doubt the murderer of the two families, but, as contemporary records regretted, he succeeded at the last moment in cheating justice.[14] But justice took revenge on him, for public indignation

[10] See *Parl. Deb.* (1812), vol. 21, cols. 211 and 212.

[11] There was some doubt whether his real name was not Murphy.

[12] Thus, two police officers from Shadwell went to Marlborough Street to arrest a man named Cobill; an investigation also took place of another suspicious character, one " Long Billy "; and several Portuguese were still detained. As late as August, 1812, Lord Sidmouth requested the magistrates to inform him whether, in the course of their examinations relating to the Ratcliffe murders, there had appeared any circumstance which would lead to a belief that a man of the name of John Gibson, detained on the *Royal William* at Spithead, having been sent to this country on suspicion of being concerned in those crimes, was really involved in them; letter from J. Beckett to the magistrates, Shadwell Police Office, August 8, 1812, in H.O. 65/2.

[13] Letter of George Storey, Edward Markland and Robert Capper (magistrates of Shadwell Police Office) to R. Ryder, Dec. 27, 1811, in H.O. 65/2.

[14] In a note to Beckett before Williams's death but after his first examination, the Shadwell magistrates stated: " tho' many circumstances arise against him we are not yet certain that he will prove the Man." After Williams had hanged himself they stated that, on the basis of his examination before his suicide, and of further inquiries subsequently, they believed it certain that he was the murderer and that he alone was responsible. See letters from G.

required to be satisfied. An inquest was held upon his body and a verdict of *felo de se* was returned by the jury. According to the usual practice, Williams should have been buried at the nearest cross-roads, but in this case the Home Secretary decided, following a conference with Robert Capper, the Shadwell magistrate, that the body should be publicly exhibited in procession through the neighbourhood which had been the scene of his crimes, provided there was no risk of a disturbance.[15] The procession, unique in legal annals, staged in a most elaborate manner and with many *macabre* details, took place on January 1, 1812.[16]

A Shock to Public Complacency

De Quincey has stated that Southey in conversation with him ranked the crime of Williams as " amongst the few domestic events which, by the depth and expansion of horror attending them, had risen to the dignity of a *national* interest." [17] De Quincey's irony has lifted the gruesome drama out of its sickening bloodiness. " With respect to the Williams murders," he wrote, " the sublimest and most entire in their excellence that ever were committed, I shall not allow myself to speak incidentally. Nothing less than an entire lecture, or even an entire course of lectures, would suffice to expound their merits." [18] To him this was a murder " the most superb of the century by many degrees " that had occurred in the heart of London. That " great exterminating *chef-d'œuvre* of Williams at Mr. Marr's, No. 29, Ratcliffe Highway . . . was the *début* of the artist; at least, for anything the public knew. What occurred at Mr. Williamson's twelve nights afterwards—the second

Storey, E. Markland and R. Capper to Beckett, Dec. 26, 1811, and Dec. 27, 1811, both in H.O. 42/118.

Strangely enough, Sir George Stephen referred to the case some twenty-five years later, and without adducing any new evidence maintained that Williams's guilt had not been established: *A Letter on the Probable Increase of Rural Crime addressed to Lord John Russell, etc.* (1836), at p. 27.

[15] Letter from J. Beckett to R. Capper, Dec. 28, 1811, in H.O. 65/2.

[16] See *History of English Criminal Law*, vol. 1, p. 198, where the procession is described. It is interesting to note that on December 29, Sir John Carr suggested a public parade of the body of the dead man so that a " salutary example might . . . be presented to the lower orders." Constables were to be used to keep the public from the parading cart; the murderer's instruments were to be shown with him. See letter from Sir John Carr to R. Ryder, Dec. 29, 1811, in H.O. 42/118.

[17] Quoted by Frank Wadleigh Chandler, *The Literature of Roguery* (1907), vol. 1, p. 183.

[18] See Thomas de Quincey, " On Murder considered as one of the Fine Arts," in *Confessions of an English Opium-eater and other Essays* (ed. by A. W. Pollard, 1901), pp. 261–296, at p. 290.

work turned out from the same chisel—some people pronounced even superior." [19]

Be that as it may, it is obvious that crimes of this nature could happen even under the most perfect system of police and, indeed, have happened in all countries and at all periods. Before these two outrages, hundreds of crimes had been committed with impunity in this very district. Nevertheless, there had been no public outcry that the traditional machinery for keeping the peace should be altered, though the inefficiency of the existing police system was so manifest that it could hardly have passed unnoticed by anybody living in the neighbourhood. Now and then a resident had written to the Home Office complaining about conditions, but these were rare and isolated instances.

The perpetration of these crimes fell like a thunderbolt upon the complacency of the public and those in authority. In Shadwell all the watchmen were instantly discharged. In their stead two companies, each consisting of eighteen men, were established as patrols, and four men were to be employed as rounders, each man to have a watchcoat, a rattle, a lantern fixed in his belt, a cutlass and a pistol; absentees were to be summoned before the magistrates. At the same meeting at which it was decided to adopt these measures, it was also resolved that the current system of nightly watch was wholly inadequate, and the hope was expressed that the government would " hereafter see fit to give general Directions " [20] upon the system to be evolved to take its place. At Wapping, sixteen extra watchmen or patrols " have been appointed since the murders." The magistrates of the Thames Police Office resolved that " owing to the general alarm of the people the river police will patrol the streets over the Holidays." [1] In the Liberty of the Rolls a number of " gentlemen and respectable inhabitants " joined together to set up a new civil force supported by their own exertions. They held several meetings and gave most assiduous

[19] " Supplementary Paper on Murder considered as one of the Fine Arts," *ibid.*, pp. 297–311, at p. 301. According to de Quincey, if the magistrates had at once made public the initials of the ship's carpenter's mallet which Williams left, together with a chisel, at Marr's house, he would have been caught earlier and the murder of the Williamsons would not have taken place. " Yet the magistrates kept back this fact from the public for the entire twelve days and until that second work was accomplished "; *ibid.*, p. 291.

[20] Printed report of the meeting of the parish of St. Paul's, Shadwell, Dec. 24, 1811, in H.O. 42/118.

[1] Printed report of the meeting of the parish of St. Paul's, Shadwell, Dec. 24, 1811; return of Shadwell Public Office, Dec. 28, 1811; letter from the magistrates, Thames Police Office, to J. Beckett, Dec. 24, 1811; return of watch, parish of St. Paul's, Shadwell, to J. J. Mallett, Dec. 27, 1811; letter from John Harriott and John Langley (Thames Police Office) to J. Beckett, Dec. 30, 1811; letter from William Baker (vestry clerk of St. Anne's, Middlesex) to chief clerk, Shadwell Public Office, Dec. 27, 1811. All in H.O. 42/118.

attention to a plan submitted to them by John Prince Smith, a barrister-at-law. They adopted it, and entered into a solemn resolve to perambulate regularly the streets and lanes of their district as leaders of a reinforced watch.[2] The scheme, as stated in a handbill, was brought into being "in consequence of the alarm which spread so generally through the metropolis upon the murders of Marr and Williamson and their families."[3] Several parishes in the neighbourhood of the Thames Police Station volunteered for night patrols. The vestry clerk of St. Anne's, Middlesex, while reporting that parishioners had taken on themselves the responsibility of watching the parish, added that nevertheless they did not doubt "that the subject of more effectually protecting the Lives and Properties of His Majesty's Subjects will early attract the attention of the Legislature."[4]

There was serious apprehension lest "the frequency of the late horrible Outrages must induce a Belief that the wicked Part of the Community is becoming too strong for the law."[5] When, several days after the crimes had been committed, the authorities still seemed unable to trace the murderer, *The Morning Post* voiced the clear alternatives: "Either respectable householders must determine to be their own guardians, or we must have a regularly enlisted armed police under the orders of proper officers." A suggestion was made that watchmen should be equipped with firearms, but the magistrates were informed by the Home Office that the Secretary of State "thinks the policy of such a measure at any time very questionable, but at all events he thinks it would be improper to decide upon doing so as a permanent measure, till the event of the enquiry into the State of the Police in Parliament is known, when it is possible some Regulations for arming the Watchmen in a suitable manner may be recommended to different Parishes."[6]

Many of the letters throw a vivid light on the various deficiencies of the existing police system, and this information is of considerable interest, since it is based on local knowledge which could not otherwise have been obtained. "I must beg leave to observe," wrote a magistrate, "that the whole of the present system of

[2] See J. P. Smith, *An Account of a Successful Experiment for an Effectual Nightly Watch, recently made in the Liberty of the Rolls, London: submitted for the Consideration of all Parochial Authorities in the Metropolis and elsewhere, etc.* (1812), pp. 26–28.

[3] *Ibid.*, p. 24.

[4] Letter from William Baker to the chief clerk, Shadwell Public Office, Dec. 27, 1811, in H.O. 42/118.

[5] Letter from E. Chippendale (of Serjeants' Inn) to the Home Office, Dec. 28, 1811, in H.O. 42/118.

[6] Letter from J. Beckett to J. Moser, Jan. 15, 1812, in H.O. 65/2.

watching in London is extremely bad"; the men were too old, the times uneasy, the hours on duty ill arranged, calling the hours was useless, and "the commodious watch Boxes inviting to sleep."[7] The charges against watchmen and the whole system were numerous and precise. It was said that for half of every hour they did nothing but talk and sleep, while burglaries were being committed in the houses which they left unguarded. They were also "too much engaged in matters of lucre," either arresting people on "some frivolous charge," or taking money from "unfortunate females who are then suffered to choak up the avenues to the principal streets."[8] They were too comfortable, and were generally half-drunk when on duty; there were not enough of them, often only one on each beat, and this made them afraid of thieves[9]; the lantern and rattle occupying both hands tended to put them at a disadvantage; they were not adequately paid and were supported by prostitutes[10]; darkness in the streets hid their neglect of duty and encouraged crime[11]; they were so discredited that respectable men could only be induced to join the watch if it were decided to change the "degraded name of Watchmen for Warden of the Night"[12]; there was lack of co-operation among the several police establishments in London and the other cities.[13] An anonymous correspondent told Ryder bluntly that, if he "lived in the habits of acquaintance with persons in the middle and lower ranks," he would know "that Police officers will not detect criminals . . . unless they are paid very handsomely for it."[14]

The dismissal of some units of the civil force, the spontaneous associations of citizens combining to act as guardians of the peace, and the blunt criticisms and disclosures of inefficiency and corruption in the prevailing system, created something of a sensation. Never before, not even after the Gordon Riots which brought the capital so close to utter destruction, and gave so striking an illustration of the failings of the justices and parish constables, did the public express so vigorous and persistent a condemnation of the traditional machinery for keeping the peace. This condemnation was, however, but the beginning of what turned out to be a

[7] Letter from Baines to R. Ryder, Jan. 12, 1812, in H.O. 42/131.
[8] Letter from W. Smith to R. Ryder, Jan. 13, 1812, in H.O. 42/119.
[9] Letter from H. Keeble to R. Ryder, Jan. 16, 1812, in H.O. 42/119.
[10] Letter from Henry Matthews to R. Ryder, Jan. 18, 1812, in H.O. 42/119.
[11] Letter from Edward Moland Emery to R. Ryder, Jan. 24, 1812, in H.O. 42/119. It was stated that in London, except for a few places, lamps went out between 12 and 1 o'clock.
[12] "Notes on Watch," undated, probably January 1812, in H.O. 42/131.
[13] Letter from W. Tweddale to R. Ryder, Jan. 25, 1812, *ibid.*; in it he also deplored that so many of the watchmen were Irish, while criminals were also mostly Irish.
[14] Letter from "a Livery and Inquestman of the City" to R. Ryder, Jan. 20, 1812, in H.O. 42/119.

strong public movement all over the country, which could not be satisfied by merely pouring contempt on the existing arrangements. The improvements introduced on the spur of the moment under the impact of the Williams crime were by no means regarded as all that was needed. "The number of Burglaries and other felonies of an atrocious nature which nightly occur in this as well as other districts of the town," declared the magistrates of Hatton Garden, "[appear] to us to call for our utmost exertions."[15] What public opinion seemed to demand was fundamental reform, and this new frame of mind found expression in the stream of suggestions and proposals which poured into the Home Department from every part of the country.

"Good Time to Make Police Changes"

One letter-writer voiced the feeling of a great many others when he wrote to the Secretary of State for the Home Department: "This would be a favourable period to adopt such regulations in the Police . . . as at another time could not so well be attempted."[16] Indeed the Department was inundated with projects for reform.

A few ideas, eccentric or coloured by prejudice, may be disregarded.[17] The other schemes indicated that their authors had devoted much time and thought to the subject of the police; yet, with one exception, which will be noted later,[18] all their proposals were for reform within the existing framework, while many, if adopted, would even have accentuated its most questionable features. This applied particularly to the suggestions made by those who still believed that an extension of the system of rewards was the safest and most effective instrument for the prevention of

[15] Letter from the magistrates of Hatton Garden to J. Beckett, Dec. 23, 1811, in H.O. 42/118.

[16] Letter from Robert Hasketh to R. Ryder, Dec. 23, 1811, in H.O. 42/118.

[17] Such, for instance, as that contained in a memorandum forwarded by B. Dudley, in which apparently the Regent himself took a great interest, expressing the desire that its author should be enlisted in the police. Another was that every house with a male capable of bearing arms should have "a Hanger, Javelin or Pike"; likewise a small wicker basket shield about twelve or more inches in diameter, with a strong wicker handle projecting from the centre of the concave side, to help ward off a blow from a "Mall or Iron Bar" and give time for "a thrust with the Cutlass, Javelin or Pike"; letter from Garnet Terry to R. Ryder, Jan. 14, 1812, in H.O. 42/119. In an anonymous letter, signed "Diogenes," one writer attributed the existing state of crime to Catholics and urged the authorities not to allow them the privilege of absolution because they did not regard a crime as such if directed against "hereticks," and concluded: "Is it then surprising that the *votaries of that faith* are so prone to *commit crimes*" (italic in original); letter to the Home Office, Jan. 1, 1812, in H.O. 42/119.

[18] See below p. 53, note 16.

crime. The general acceptance of this belief is indicated in the letters received by the Home Office after rewards had been announced following the second murder. Dissatisfaction was expressed that no offer of reward and pardon to accomplices had been made at once, and it was suggested that the Regent should issue a new proclamation which would not preclude from pardon and rewards anyone who had been implicated in the murders.[19] It was also proposed that the government should enact that, in future, parishes should offer rewards for the detection of crimes committed in their areas.[20] Another correspondent went so far as to express the opinion that a free pardon and two hundred pounds per annum for life should be paid to every accomplice in capital offences through whom two reliable witnesses were found. "The bribing of Criminals against each other is the only way that Criminals can be punished. . . . I propose to break for ever all bonds and Confidence between Criminals, [for] it is confidence in each other alone which gives them power to injure Society." Then no man would dare to commit a crime knowing that it would be so profitable to his accomplice to betray him.[1] An anonymous writer even worked out the following scale: three hundred pounds for murder; one hundred pounds for housebreaking and two pounds for picking pockets.[2] "A friend to an active and preventive police force" thought along similar lines: three pounds paid for conviction of each reputed thief "would make the Police Officers much more alert in discharging their duties," while five pounds on conviction of each pickpocket should always be offered.[3] That no reward was ever given for the apprehension of reputed thieves was regretted by yet another critic.[4]

At a meeting of the vestry in Kensington it was resolved to open a subscription fund which, among other things, would provide rewards "for apprehension of offenders, and the expenses of prosecuting such offenders if necessary."[5] It was proposed that forty shillings should be paid to anyone who prevented the commission of a crime; five pounds to anyone capturing a criminal; and ten

19 Letter from "Housekeeper" to R. Ryder, Dec. 12, 1811, in H.O. 42/118, and from Lovegrove (of Wallingford) to R. Ryder, Dec. 20, 1811, *ibid.* Cook (of Birmingham) felt that £2,000 should have been offered, even to accomplices, in the murders of Marr and Williamson; letter to R. Ryder, Dec. 23, 1811, *ibid.*

20 Letter from W. Wynyard (of Sloane Street) to J. Beckett, Dec. 23, 1811, in H.O. 42/118.

1 Letter from Cook (of Birmingham) to R. Ryder, Dec. 23, 1811, in H.O. 42/118.

2 Letter signed "F. W. a very loyal Subject" to R. Ryder, undated, but probably Dec. 29, 1811, *ibid.*

3 Anonymous letter to R. Ryder, undated, in H.O. 42/118.

4 E. Chippendale to the Home Office, Jan. 2, 1812, in H.O. 42/118.

5 Printed notice of a meeting held in Kensington, Dec. 26, 1811, in H.O. 42/131.

pounds should be the reward for arresting an offender in the act of cutting, wounding or maiming. All rewards were to be deducted from the King's taxes and were not to depend upon the discretion of "niggardly or mercenary Parish officers." [6]

Besides this disquieting tendency to adopt an elaborate system of rewards as the main device of crime detection, there were a few suggestions for tightening the control over the dangerous elements of society. These included a more stringent supervision of workmen and strangers employed at, or moving about, the docks; wider powers for magistrates of detaining idle and disorderly persons, or of enlisting into the army or navy those who "cannot give a satisfactory account of their way of living"; the rounding-up of notorious thieves in such of their haunts as were well known to the police; the registration of servants; the placing of foreign crews under restrictive and supervisory regulations; the branding of thieves and receivers of stolen property; the suppression of flash houses and more discrimination in the granting of licences to "professed Pugilists," in order to preserve public-houses from becoming the haunts of "low blacklegs and thieves." [7]

But, on the main issue, the great majority of the proposals simply aimed at raising the standards of the parochial police and of the nightly watch without introducing any drastic change in the structure or control of the available forces. It was proposed to increase the number of watchmen and to enrol only such as were between twenty and forty-five years of age, and bore a good character [8]; they were to be adequately armed,[9] and an end should be put to calling the hour.[10] They should be severely punished, it was maintained, for neglect of duty,[11] and watchboxes should

[6] Letter from Garnet Terry to R. Ryder, Jan. 13, 1812, in H.O. 42/119. See also the letter from A. Graham to J. Beckett, Dec. 28, 1811, in H.O. 42/118.

[7] See letter from Johnson (of Fenchurch Street) to R. Ryder, Dec. 20, 1811, in H.O. 42/118; letter from Baynes (a magistrate) to Ryder, Jan. 12, 1812, in H.O. 42/131; anonymous letter to Ryder (n.d., probably Jan. 1812), in H.O. 42/131; letter from Arbuthnot to J. Beckett, Jan. 8, 1812, in H.O. 42/119; letter from T. C. Banks, including a "Plan for the Regulation of Servants with respect to their Characters and the Safety and Convenience of Families," Jan. 16, 1812, *ibid.*; letter from J. Keeble to Ryder, Jan. 16, 1812, *ibid.*; anonymous letter from "A friend to an active and preventive police force" to Ryder (n.d.), in H.O. 42/118.

[8] All watchmen over forty-five years of age to be discharged; letter from George Orr to R. Ryder, Dec. 30, 1811, in H.O. 42/118.

[9] It was felt by some, however, that they should not be armed, as "it would induce a corresponding precaution in the evil disposed"; letter from Price (of Birmingham) to the Home Office, Jan. 23, 1812, in H.O. 42/131.

[10] Except when coming on and going off duty, for otherwise they simply warned offenders of their approach.

[11] By imprisonment, if necessary. Those dismissed in one parish were not to be enlisted in other districts. One correspondent even went so far as to propose making watchmen liable to imprisonment for any crime committed in their neighbourhood, "subject to [such] case as may bear out his defence"; letter from W. Smith to R. Ryder, Jan. 16, 1812, in H.O. 42/119.

be abolished.[12] Beats should be assigned at the last moment only,[13] and the men should be controlled while on duty. It was also suggested that there should be small patrols in each parish, and that parishes should be made more directly responsible for crimes committed in their areas and more reliant upon self-protection.

These were the commonest proposals by which it was expected that the civil force might be made more effective without disturbing the *status quo*. There were two or three projects of a more radical nature, but even these did no more than extend the power of magistrates in some matters affecting the police. Thus, B. Dudley took a gloomy view. He informed the Home Office that " a general principle of riot and disorder " had been established and was being extended owing to the increase in population and by the " widespreading dissoluteness of the lower orders." But his remedy was merely to divide the Metropolis into districts; to supersede the parochial watch by a domestic watch, which would be composed of men still remunerated by the parishes but approved by the magistrates; and to establish an armed night patrol, partly on foot, to control the watch.[14] Another correspondent wrote on similar lines.[15] Parishes, he urged, should be obliged under an Act of Parliament to appoint the right number of watchmen and to fix a rate for their upkeep " subject to the approbation of the Magistrates of the Public Office of the District." The duties of officers should be fixed by a committee of magistrates and parishioners, while the former were to approve fitness of appointments.[16] Sir Richard Birnie simply confined himself to complaining that the high constable in the City of Westminster, being inadequately paid, was not fulfilling his duties at all, and that in order to find a good man an adequate salary should be offered.[17]

12 " All watch boxes to be removed as they only sleep in them "; letter from George Orr to R. Ryder, Dec. 30, 1811, in H.O. 42/118.

13 Each watchman was to be accompanied by an armed patrol, who was to draw his round from a box so that he would not know before going to the watchhouse where he was to be stationed. See " Outline of a Plan for the better regulation of Watching the metropolis, and . . . protecting its inhabitants against Murders, Burglaries and Street Robberies "; anonymous letter, probably Jan. 1812, in H.O. 42/131.

14 Letter from Arbuthnot to J. Beckett, with enclosure " A few Observations respecting the Police of the Capital," Jan. 8, 1812, in H.O. 42/119.

15 Letter from A. Graham to J. Beckett, Dec. 28, 1811, in H.O. 42/118.

16 Sir David Williams, of the Whitechapel Police Office, was the only one to suggest that the appointment of the watch should be taken from parishes and given to magistrates; that watchmen should be deemed peace officers and be under the control of magistrates; letter from Sir David Williams to the Home Office, Dec. 28, 1811, in H.O. 42/118. Sir David Williams, it would appear, was implicated in a singularly lax administration of the licensing laws. The evidence against him, collected by the 1816 Committee, was rather embarrassing.

17 He took employment as a coal merchant and dealer in tobacco for public-houses, and was thus under obligations to people whom it was his duty to watch.

William Fielding proposed the employment of firemen as auxiliary police patrols.[18] Even Colquhoun, very probably disheartened by the abandonment of the reform advocated by him and endorsed by the Twenty-eighth Select Committee on Finance, and realising how slender were the chances of enlisting public support in favour of a drastic reorganisation of the system, put forward some rather superficial though useful suggestions which would have left the structure intact.[19]

It is true that the Wapping murders had created considerable alarm and awakened the latent dissatisfaction but, to judge from the response of these private citizens, there were few constructive proposals that emerged and there was little indication that the public was prepared to face the fundamental issue of police reform.

An Urge for Reform Which Came to Nothing

A lack of official enthusiasm

On January 18, 1812, Richard Ryder [20] moved for a committee to investigate the state of the police.[1] In doing so he declared that, although it was hardly necessary for him to enter at any great length into his reasons for bringing forward the motion, " at the same time, he felt himself justified in stating, that if the expediency of the measure rested upon the late horrible murders alone, by which two whole families had been completely exterminated, the

Moreover, he had been appointed to the office in succession to his own brother, who had absconded with money: " It is seldom except on Militia business, however, that I see him." For all that he was in command of the eighty constables of the city. See letter from Richard Birnie to J. Beckett, Jan. 14, 1812, in H.O. 42/119.

18 Letter from William Fielding to J. Beckett, Jan. 31, 1812, *ibid.*

19 He proposed that no watchman should be appointed under thirty-five or over fifty-five years of age; their number was to be in proportion to the number of houses; their allowances never to be less than 16s. per week; the time of their rounds to be varied daily; patrols to be increased and to be on duty as soon as darkness fell, and they were not only to help but also to supervise the watchmen; they should be armed with muskets and the watchmen with staves; each watch should first appoint a superintendent of the whole force, both watch and patrols; justices of the peace at Petty Sessions should be given power to fine or imprison those who neglected their duty; the high constable should be made a stipendiary officer in order to give all his time to his duties; none should be appointed a constable if he were a publican, if he could not write, or was elderly or infirm. See letter from J. Colquhoun to R. Ryder, Jan. 14, 1812. These were all useful suggestions, but they fell far below his plan of reform as presented to the 1798 Committee, and as outlined in his pamphlet *National Police etc.* published in 1799. Yet, as he himself stated when giving evidence before the 1816 Committee, he still fully adhered to that plan, although in the memorandum he confined himself to advising " . . . a uniform system."

20 In the ministry of Spencer Perceval, from November 1, 1809, to June 1812, he was Secretary of State for the Home Department. He was also *ex officio* a commissioner of the Board of Control for the affairs of India.

1 See *Parl. Deb.* (1812), vol. 21, H.C., Jan. 18, " Nightly Watch and Police of the Metropolis," cols. 196–222.

atrocity of those crimes would in themselves have afforded a sufficient ground." [2]

Yet neither the government nor the opposition showed any great enthusiasm. The original terms of reference confined the scope of the committee to an investigation "into the State of the Nightly Watch of the Metropolis and the Parishes adjacent." This unjustifiable limitation of the committee's sphere raised a suspicion regarding the intentions of the government. Were they really desirous of reforming the police, or did they merely wish to give an outlet to the voices of dissatisfaction and to allay public alarm caused by the two atrocious murders? Some of the remarks made by the Home Secretary in the course of his speech in support of the motion would seem to justify such doubts. No objection could be taken to his observation that, "even in places where the peace was committed to the care of an armed police, a police furnished with all those powers with which under a despotism it was possible to furnish it, without any regard to the prejudices of the people," crimes such as those committed at Wapping were of frequent occurrence. But he certainly laid himself open to criticism when he outlined to the House the proposed scope of the inquiry, and the kind of recommendations which would meet with his approval. Until 1774 each parish had provided for its own watch, but by the passing of 14 Geo. 3, c. 90, applicable to the most populous districts, Parliament had intervened with a view to securing a greater degree of uniformity and a higher standard in the parochial forces. It was obvious, the Home Secretary contended, that the provisions of the Act were "evaded and neglected," and he "should not trouble the House by attempting to enumerate the various instances." [3] The committee would have to examine the utility of the Act and also the variety of local statutes relating to the same subject, and it would be for them to decide whether it was advisable to alter the system entirely, or whether it would be sufficient to enforce the Act without any innovations. He safeguarded himself by saying that it would be "quite unnecessary, indeed it would be unbecoming, in him to anticipate that by proposing any arrangement of his own." Nevertheless he immediately qualified this statement by a characteristic pronouncement: "As far, however, as he had thought

[2] *Ibid.*, col. 196.

[3] The Act required that the trustees should appoint none but "able bodied men" and, stated Ryder, "he would leave to their own observation to decide how far this was complied with." The truth was that those who were too old to earn their bread were appointed to be watchmen in order that they should not become a burden to the parish. Anything approaching uniformity was also far from being secured since, for instance, the parish of St. Pancras was divided into seven districts, each governed by its own local act; see *Parl. Deb.* (1812), vol. 21, cols. 197–198.

upon the subject, he had no objection to state generally, that he rather inclined to the notion of enforcing the present system by adequate provisions, than of having recourse to any new act." [4]

The opposition was not much more constructive. Their chief speaker was Sir Samuel Romilly, who criticised the government for trying to confine the inquiry within so narrow a limit. The general increase in crime, the system of punishment, the evil effects of lotteries, the abuses in the police administration, especially the practice of paying rewards, and the inefficiency of the watch—all these matters were connected and called for investigation. He therefore urged the extension of the terms of reference.[5] Yet nowhere in his speech was there even a suggestion that what was needed was not a readjustment of the existing police system, but a radical change. Though so well acquainted with everything of importance which had been published on the subject of crime and the treatment of offenders, he never once alluded to the schemes of reform submitted by Colquhoun and adopted by the 1798 Committee, which had just been reprinted by order of the House. On the contrary, his speech contained a passage which seemed to indicate that his own view was far removed from any such proposals: "It ought to be remembered that when the police was originally established it was new to the constitution, and was introduced only on the supposition, that some great benefit would be derived from it, which would justify Parliament in departing from those principles by which they had, until that period, been guided on the subject. It was time to ask, whether the expected advantages had accrued." [6]

To Sir Francis Burdett the only remedy seemed to be to make every county and parish responsible to its householders for any losses which they might sustain as a result of crime, and to impose an obligation on every householder in his turn to keep watch for the protection of others. Under such a system alone could effective security be afforded to the community "without the immediate interference of any police"; and the responsible part of the population, accustomed to the use of arms, would be available for the defence of the kingdom in case of foreign invasion and for putting down internal disturbances.[7] Sheridan spared no sarcasm nor contempt for the authorities concerned with the murders at Wapping. He severely censured the magistrates for indiscriminate arrests and their unjustifiable suspicions of foreigners, especially the Irish; he attacked the prison authorities for not having taken

[4] *Ibid.*, col. 197.
[5] *Ibid.*, cols. 198–202.
[6] *Ibid.*, col. 212.
[7] *Ibid.*, cols. 212–213, at col. 212.

elementary precautions against the possible suicide of Williams; and finally criticised the government for having "fed the worse appetites of the mob in the unseemly exhibition of the dead body to the multitude." [8]

The Chancellor of the Exchequer, Spencer Perceval, vindicated the conduct of the authorities. He was by no means sure whether it would not be better if the system of rewards, instead of being abolished, were to be extended to all offences. He then raised an altogether different issue, and warned the House that it would not be advisable to extend the powers of the police so as to enable them to "take up persons, not for the crimes which they had committed, but only on suspicion of the crimes which they might possibly commit." [9] The Home Secretary contradicted the view expressed by Romilly and W. Smith, that police officers were often unwilling to detect crimes or apprehend offenders unless they were involved in cases which could bring them rewards: "he had had recourse to the best authority . . . the magistrates, who were surely the most competent to give an opinion on the subject, that no such indisposition existed." [10] Smith questioned the value of preventive measures when applied to crime in general, as he was afraid that the only effect of improvements would be "to drive them [the criminals] out of the metropolis into the environs." The debate seemed to be branching out in unpredictable directions when Cochrane ascribed the increase in crimes "to the Pension List and to the various other modes by which individuals of the higher classes, and particularly members of that House, partook of the public money, without performing any public service," a practice which had a demoralising effect on the lower classes and drove them to the commission of offences "of which they otherwise would have never thought." [11]

The whole discussion was singularly incoherent and conspicuously lacking in constructive approach. The government finally yielded somewhat and extended the terms of reference of the proposed committee,[12] which was duly appointed. Almost two months later, on March 24, 1812, it reported its findings to the House.[13]

[8] *Ibid.*, cols. 218–219.
[9] *Ibid.*, cols. 206–207.
[10] *Ibid.*, col. 211.
[11] *Ibid.*, cols. 203 and 210.
[12] The amendment to Ryder's motion proposed by J. Abercromby purported to add the words, "and also into the state of the Police of the metropolis." After some resistance Ryder consented to it, provided that the word "further" be substituted for the word "also," to which the opposition consented; *ibid.*, col. 210.
[13] See "Report on the Nightly Watch and Police of the Metropolis" (127), *Parl. Papers*, Reports (1812), vol. 2, p. 95.

A disappointing report

The report of the committee was not without value, because it revealed that many of the evils complained of twenty years earlier still prevailed as widely as ever, in spite of the legislation which had been designed to eradicate them. It also made a number of suggestions which, if they had been put into effect, might possibly have brought about some improvement. Nevertheless in respect of the crucial issue it was a disappointing document, marking a definitely retrogressive stage in the movement for reform. The real question at issue was that of supreme control: on this the unity and efficiency of the police force must ultimately depend. Not that the committee ignored or underestimated its importance; on the contrary, they themselves insisted upon it in most emphatic terms, reverting to it several times in their general review of the various establishments.[14] But instead of endorsing the central idea of the Committee of 1798, which had been advanced with so much vigour and persuasiveness, namely that a board of police commissioners should be responsible for the general management of police forces, they abandoned it altogether, giving no reason for so doing, and substituted a cumbrous machinery which gave no guarantee of any unity of system or administrative efficiency.[15]

Under their scheme the responsibility for police arrangements was to be vested in the seven magisterial offices of the Metropolis, with the office at Bow Street—which had no connection with any of them—as "the proper centre."[16] The boards of magistracy created by 32 Geo. 3, c. 53, had become known as police offices, although neither by the provisions of that Act nor by the nature of their duties as justices of the peace had the magistrates "any superintendence whatever in matters of preventive and parochial Police, or any necessary knowledge of the principles on which the several independent unconnected Parishes act, or of the details by which the Peace and good Order of the Metropolis are endeavoured to be maintained; nor have they any means of obtaining this knowledge, except incidentally, in consequence of persons being brought before them charged with disorderly conduct, or suspected of having committed crimes." They merely

[14] They regretted "that want of unity, that want of dependence of parts on each other, that want of a general superintendence and controul, without which every system of government must be imperfect"; *ibid.*, p. 98.

[15] The absence of any reference to this scheme is still more significant when it is noted that in 1810 the Twenty-eighth Report from the Select Committee on Finance of 1798 was printed by order of the House of Commons; see (348), *Parl. Papers*, Reports (1810), vol. 4, pp. 375–598.

[16] "Report on the Nightly Watch and Police of the Metropolis" (127), *Parl. Papers*, Reports (1812), pp. 98 and 100.

constituted, to quote the Report again, "the first stage in the administration of Criminal Jurisprudence." [17]

This, the committee felt, was an anomaly, and they consequently proposed that the seven magisterial offices should become "constituting centres," to which should be forwarded daily reports from the several parishes, situated within the jurisdiction of each. These reports were to give the number and description of the persons employed on the watch during the preceding night, any occurrences which might have taken place while they were on duty, and general information on the state of order or disorder which might prevail. From the staffs of the magisterial offices were to be chosen police officers who were to visit in rotation all the watch-houses in the district. They were to report each morning on the vigilance, good conduct and fitness of the constables, beadles, patrols and watchmen who had been on duty during the night. High constables were to make similar inspections and reports, aided by a number of assistants, who might be stipendiary officers paid either out of the county rate or out of some rate to be levied within their respective divisions. Finally, there should be put into effect the provision of 14 Geo. 3, c. 90, directing that the several parochial authorities of the City and Liberties of Westminster and of certain other parishes should meet and draw up more detailed regulations for the instruction and guidance of the constables, beadles, patrols and watchmen. Such regulations were to be communicated to the magisterial offices in order that the police officers on their nightly inspections might be able to judge whether they were being properly observed.

The committee considered that by these means the magisterial offices would acquire sufficient knowledge to enable them to instruct their principal police officers in the carrying-out of their duties of inspection. Also they would be able to exercise properly the power which would be vested in them to dismiss such watchmen or patrols as appeared unfit for their task by reason of bodily infirmity, negligence or misconduct. To complete the system, however, it was necessary for the information accumulated at each of the seven magisterial offices to be collected "at some one central point, in order that there may be the means of comparing the occurrences and transactions and circumstances of the various parts of the Town, and of forming estimates, from the comparison of such facts, of the probable means for the effectual prevention of crimes, or for the detection, pursuit, apprehension and conviction of criminals." [18] Bow Street was chosen for the purpose. To one of its officers would

[17] *Ibid.*, p. 98.
[18] *Ibid.*, p. 100.

be assigned the task of comparing and digesting all information received, and of communicating it, not only to all the other magisterial offices, but also to the Secretary of State for the Home Department.

The project is significant, not only because it illustrates a growing realisation of the need for a unified system and effective control in police matters, but because it introduced the idea of a central authority, namely, the Home Office.[19] Yet the committee were too sanguine if they expected that the proposed machinery would call "into activity the attention of a great number of persons as to matters of preventive Police" and would introduce "that system of superintendence and controul which may keep alive and continue the activity and vigilance which has thus been excited." Responsibility still remained divided among a great number of bodies and persons; the "central point" was conceived primarily as a clearing-house for sorting a mass of information; a too optimistic view was taken of the competence of the magisterial offices to direct the various police forces. A much more radical reform was really needed.

The superficiality of the recommendations is further shown in those concerned with the police in the City and Liberties of Westminster and the several parishes adjacent to it. The Act of 14 Geo. 3, c. 90, passed as the result of a previous inquiry, had remained, according to the 1812 Committee, largely a dead letter. Yet they suggested that it be retained, hoping that the several amendments proposed would bring it to life.[20]

An abortive Bill

In January, 1812, Romilly noted in his diary: "This Committee has since made a report, the object of which seems to have been to suppress all information as to the present state of the police. It contains no evidence and does little more than refer to some old Acts of Parliament."[1] This was too severe, though the report was certainly disappointing. What Romilly did not mention was that the opposition had done very little to prompt the government to take action; indeed, their attitude can hardly be described otherwise than as obstructive and somewhat irresponsible. When in July, 1812, the Nightly Watch Regulation Bill was being

[19] See L. Radzinowicz, "First steps towards government control over police before Peel," in *Law Quarterly Review*, 70 (1954), p. 88.

[20] The amendments proposed to the Act of 14 Geo. 3, c. 90, are listed in Appendix 5 of the Report at pp. 123–124.

[1] See *Memoirs of the Life of Sir Samuel Romilly, etc.* (1840), vol. 3, note * at p. 6.

debated,[2] Whitbread presented a petition against it from the parish of St. Luke, and several members of the House, including Romilly, joined him in criticising the projected measure. Romilly did not like it because it "gave new and extraordinary powers to the police magistrates,"[3] while another member said that "all the parishes in the county of Middlesex were unanimous in their opposition to this Bill." But Brougham certainly surprised them all. He objected to the Bill because he disliked legislation actuated by "sudden and temporary impulses and passions." The Bill, he said, was going "to alter the whole system of police in the metropolis." Then came this misleading, not to say grotesque, pronouncement: "The present constables were generally respectable housekeepers, who acted gratuitously, and who were entitled, in no small degree, to the protection of government. The present Bill threw a suspicion on this meritorious body of men . . . ."[4]

The Bill was largely, though not entirely, based on the recommendations contained in the report.[5] It certainly made no radical innovations. It accepted the traditional structure of parochial police as retained by the Act of 14 Geo. 3, c. 90, and aimed chiefly at extending the system to a number of parishes where no nightly watch was in existence, or where it was inadequately regulated by local Acts. In general, also, it was hoped to increase the effectiveness of the parochial units by bringing them under closer control of the magisterial offices. It proposed that the Act of 14 Geo. 3, c. 90, should extend to some fifty places, but that in each of these the watch should be directed by trustees composed of twelve inhabitants of the particular area. Patrols were to be appointed to perambulate each parish, to superintend the watchmen, to inspect the alehouses and the state of the lighting, to report all occurrences to the constable of the night at the watch-house and enter them in a book to be kept there for that purpose. The patrols were to be on duty all night. Another clause proposed that the watchmen should still have regular beats but should also have power to act in an adjoining parish so as to protect the boundaries of each. The night was to be divided into two watches, with half the watchmen on duty in each. They were to continue at their posts until their successors appeared to relieve them. Failure to perform this duty punctually was to be punished by a fine, imposed by the trustees

[2] See *Parl. Deb.* (1812), vol. 23, H.C., 8 July, "Nightly Watch Regulations Bill," cols. 949–951.

[3] *Ibid.*, col. 950.

[4] *Ibid.*, col. 950.

[5] See "A Bill for the better Regulation of the Nightly Watch in the City of Westminster, and the Vicinity of the Metropolis" (May 8, 1812), *Parl. Papers* (1812), vol. 1, pp. 1041–1058.

of the parish but paid to the watchman who had had to continue on his beat because his relief had failed to appear. A proposal, which is interesting because it implied an unequivocal recognition that the parochial units should be controlled by a professional policeman, was that in every parish there should be an assistant high constable, paid out of the rates to be levied to carry the Act into execution, but appointed by the magistrates. It was to be his duty to superintend watch-houses and the conduct of constables who were there for the performance of certain duties, such as taking charge of persons brought in by the watchmen and patrols, receiving reports from the latter, entering them in a book kept there for the purpose, and transmitting copies to the magisterial office the next morning.

All the parishes brought within the Act were to be divided into eight districts, each of which was to be "assigned" to one of the magisterial offices, where complaints about watchmen and patrols were to be heard and examined by the magistrates. When satisfied that the complaint was well founded the magistrates were to have power to discharge such watchmen—another significant innovation. But they were not given power to appoint others instead. Notification of the discharge was to be given to the parochial body responsible for the regulation of the nightly watch and it was they who were to appoint other competent persons. Copies of all regulations, rules and orders issued from time to time by the trustees in the various parishes were to be transmitted both to the Secretary of State for the Home Department and to the relevant magisterial offices.

The Bill contained two further proposals which increased not only the magisterial control over the parochial forces, but the general superintendence of the police by the Home Office. The first of these was that magistrates were to appoint one or two of their principal police officers to make rounds during the night and to report to them on the conduct of the watchmen, the patrol and the constables at the watch-houses. According to the second an officer was to be appointed at Bow Street to sort and classify "all the information relative to the state of the Police" contained in reports forwarded to the office, or collected from any other sources. This digest he was to transmit to the Bow Street magistrates who, at least once a week, were to forward a copy with their observations to the Secretary of State for the Home Department. His fixed salary was to be paid by the magistrates, subject to the approval of the Secretary of State.

Four more clauses of the Bill deserve to be noted. In order to facilitate the conviction of receivers of stolen goods, it was proposed that magistrates, in granting search warrants by written direction

under their hand, should be empowered, under particular circumstances to be stated on the back of the document, to authorise the police officer concerned to execute the warrant by night as well as by day. Hackney coachmen who were often employed to convey stolen goods by night were in the habit of substituting a false plate for the one upon which their number was displayed. In order to circumvent this practice another clause of the Bill provided that the numbers should be printed in plain and legible characters of a fixed size on the panels of the vehicle itself. Doubts had arisen whether the provision in the Act of 51 Geo. 3, c. 119, for the apprehension of reputed thieves frequenting places of public resort or the avenues leading thereto, extended to the City of London. A clause was included to make this clear.

In the matter of statutory rewards the provisions of the Bill were much in advance of their time. It was proposed " that Police Officers should be precluded from sharing in the Rewards given by Act of Parliament on the conviction of Burglars and other Offenders." Instead it should be lawful for a magistrate to grant rewards from time to time to any peace officer for his " activity, address, exertion, vigilance or good conduct on particular occasions, as he may think the circumstance of the case requires." The total amount of such rewards to officers was not to exceed a certain statutory annual sum, in addition to the regular salary, and was to be disbursed from any fund available for the payment of contingent expenses of magisterial offices.

The first attempt to recast the whole system of statutory rewards had been made in the Westminster Police Bill of 1785, which, however, had been thrown out. The change then suggested was that all rewards to private persons or police officers who secured conviction should be abolished and replaced by gratuities for meritorious services, to be distributed by the Commissioners of Police to anybody who might deserve them. In the Bill of 1812 police officers only were prohibited from receiving statutory rewards. Gratuities for outstanding exertions in the discharge of their duties were to be given by the magistrates, with a fixed limit in each case. The remaining clauses of the Bill provided for a more generous and flexible parochial rating in order to defray the expense of police in the various parishes.

A few weeks later the Bill was amended in committee,[6] after which no more was heard of it.[7]

[6] See " A Bill [As Amended by the Committee] for the better Regulation of the Nightly Watch in the City of Westminster, and the Vicinity of the Metropolis " (May 27, 1812), *Parl. Papers*, Public Bills (1812), vol. 1, pp. 1059–1076.

[7] In his evidence before the Committee of 1828 Sir Richard Birnie, then chief magistrate of Bow Street Office, stated that it was he who had prepared a

Public opinion was rapidly reverting to its traditional point of view. This is reflected in a tract which appeared at that time.[8] It was written largely as a result of the panic produced by the murders at Ratcliffe Highway and its purpose was to suggest to the Committee of 1812 a plan for the improvement of the police. The scheme was based on the experience which the author had gained when he was taking a prominent part in remodelling the watch in the Liberty of the Rolls. "It has been said, the object of criminal police is the prevention of crimes: but it is argued as if the prevention of crimes by the police were distinct from their detection and punishment when committed, and as if a vigilant magistrate could by means of his agents anticipate and prevent all the robberies that would otherwise be committed. It is not so: all that a good police can do, is to frustrate house-breaking and street robberies, by means of a nightly guard, to prevent the escape of offenders, and infallibly to bring all criminals to public justice. Every other system is a system of tyranny; an organised army of spies and informers, for the destruction of all public liberty, and the disturbance of all private happiness. Every other system of police is the curse of despotism, which it is to be hoped, will not light on English ground." [9]

It was a statement involving a fundamental principle. To him the police was an establishment provided by the government "for the detection of crime, the apprehension of public offenders," [10]

scheme out of which the Bill of 1812 had been constructed; "Several gentlemen here," he said, "will remember the murders of Marr and Williamson, at Ratcliffe Highway, some years ago. The then Secretary of State, Mr. Ryder, knowing that I had looked into the parish concerns of the Metropolis a little, asked me for a scheme, I gave him one; he approved of it, and he brought in a Bill founded upon that, and the very parishes that called chiefly for assistance in that neighbourhood were the first, I believe, to petition against it." See "Report from the Select Committee of Inquiry . . . on the State of the Police of the Metropolis" (533), *Parl. Papers* (1828), vol. 6, p. 1, Minutes of Evidence, at p. 37.

[8] See J. P. Smith, *An Account of a Successful Experiment for an Effectual Nightly Watch . . . submitted for the Consideration of all Parochial Authorities in the Metropolis, and elsewhere, etc.* (1812).

[9] *An Account of a Successful Experiment*, pp. 16–17. In a note he added: "The police of *France*, say some, is admirable. Then go to *France* and enjoy it, be the reply of every free-born *Briton*!", p. 21. Strangely enough, in this very year the same sentiment was voiced on the other side of the Atlantic: "Much has been said of the great perfection of the police of certain nations, but those eulogists do not advert to the fact, that its agents are restricted by no laws, nor power, but the will of one man, that they can enter, without previous form of law, by day or night, any man's dwelling, ransack it over, and retire without informing him of the object of their visit, and happy is he, if the insult and alarm are all that he suffers, but may our good genius forever preserve us from such perfection and power of police as this; which can only accompany despotism, and is the hateful attribute of fearful tyrants." See *A Brief Treatise on the Police of the City of New York*, by a Citizen (New York, 1812), p. 29.

[10] *An Account of a Successful Experiment*, p. 2.

and he refused to admit that prevention was one of its functions. Indeed, he uttered a stern warning that in no circumstances should the police be legally empowered to interfere with, or arrest, persons whom they only suspected to be of criminal intent. Though he recognised that such a body was necessary for the maintenance of public order, he emphasised that the extent of obedience to law could easily be exaggerated. A so-called good and vigilant police then became nothing but the active tool of a despotic government, operating amid the passive submission of a subdued and degraded people. In such circumstances the police took on the nature of a military establishment and every city was guarded like a garrison. Liberty was then superseded by martial law under the guise of civil authority. "In such a state, the guard is more terrible than the thief" and the dangers to individuals from crime receded into the background eclipsed by the threat to civic freedom.[11] This was a direct challenge to the doctrine of preventive police evolved by Colquhoun and other reformers.

In no less sharp a contrast stood his proposal for the improvement of the existing system. The panic created by the Ratcliffe murders was the worst possible guide to the nature of the changes which were needed. The murders might have happened under any police system: "The watch that could arrest this man's hand, must have the powers of omnipotence, and the attribute of ubiquity." The only thing that could be said was that a vigilant police might have prevented the murderer's escape or have detected him more speedily. All that was necessary was to strengthen the watch by night, and this could be done quite easily. To conceive the main outline of the plan it was enough to visualise one hundred houses ranged in two rows, as in the streets of London, with eighteen feet on an average to each house, or twenty feet, making allowance for crossings. If a man were to walk backwards and forwards for two hours, along fifty houses, or one thousand feet, at a regular pace of three miles an hour, then he would walk six miles in two hours, equal to thirty-one thousand six hundred and eighty feet. If two watchmen for each hundred houses, placed one on either side of the street, started from different ends, then a watchman would pass by every house at intervals ranging between four and two minutes. In such a short interval it would be impossible for any house to be broken open, or much property conveyed away with impunity. The watch need not be set till the usual hour

[11] *Ibid.*, p. 3. Smith makes the comment that, although the police instructions of Alfred—keeping the peace by the organisation of the hundreds, the security of frankpledge and other preventive measures—were generally praised by modern writers, he was inclined to consider "the police of ancient days an ill exchange for the practical freedom of the *Brunswick* race": note A, at p. 20.

of rest, about eleven o'clock, and continue till six or seven. This would be only eight hours at the most. Four watchmen would protect fifty houses, watching two hours and walking six miles every night.[12]

This would require a force of about eight thousand men, while the present strength of the watch was about two thousand. But the expense would not be excessive, and could be raised from the householders by a levy of one shilling each per week. A good house should be provided for the watch who would sleep there, eight or ten in a room, to be called out on emergency. The fatigue of watching upon this plan would be so small that many active young men "would be glad to gain health and exercise by being employed in the nightly watch, who, during the day, are almost destroyed by the sedentary nature of their usual occupations." From sunset till eleven at night, a few patrols would be a sufficient protection even for a large parish. What was needed was to provide additional protection during the twelve hours of darkness, rather than to embark upon a change in the old system of watch, which would inevitably lead to petty tyrannies and arbitrary interferences throughout the twenty-four hours of every day.

In fact so rapidly did the public relapse into its traditional hostility that no project of reform could hope to awaken any but languid interest. "They have an admirable police at Paris," J. W. Ward wrote on December 27, 1811, "but they pay for it dear enough. I had rather half a dozen people's throats should be cut in Ratcliffe Highway every three or four years, than be subject to domiciliary visits, spies, and all the rest of Fouché's contrivances."[13] Immediately after the maniac had struck this warning might have been well advised. A month later it was no longer necessary, for the desire for reform had faded.

[12] *Op. cit.*, pp. 12–14.
[13] See John William Ward, *Letters to Ivy* (1905), p. 146

TRADE UNIONS AND THEIR MEMBERS

T. C. Thomas

In commenting on a decision of the House of Lords, given some fifty years ago,[1] concerning the law relating to unincorporated associations as it affected the Free Church of Scotland, Maitland was provoked to say, " I cannot think that it was a brilliant day in our legal annals when the affairs of the Free Church of Scotland were brought before the House of Lords and the dead hand fell with a resounding slap upon the living body." [2] It was with a much revitalised hand, however, that the same tribunal, in *Bonsor* v. *Musicians' Union*,[3] disturbed the slumbers of that self-same branch of our law, but this time in its application to trade unions. On this occasion, the slap has been described as a blow struck for freedom, and though the ultimate decision is in itself of the first importance, it is perhaps in a consideration of the diverse means employed in reaching that result that the student will find the greatest interest.

The decision of the Court of Appeal in *Bonsor's* case has already been noted,[4] but to an understanding of how the House of Lords came unanimously to reverse that decision, some restatement of the issues involved is desirable. Mr. Bonsor was a professional musician and a member of the respondent union, which was a registered trade union. In 1949 the union purported to expel him from membership on the ground that he had failed to pay his weekly contributions. The expulsion occurred when the secretary of the union's Brighton branch erased his name from the register of membership, but in fact the branch secretary was not empowered to do this and the expulsion was therefore in breach of the rules. In 1952 Mr. Bonsor began the present action claiming a declaration that his expulsion was wrongful, an injunction restraining the union from acting on the purported expulsion, and damages. Upjohn J. declared the expulsion to be null and void, granted the consequential injunction, but dismissed the claim to damages on the authority of *Kelly* v. *National Society of Operative Printers' Assistants* [5] in which the

1 *General Assembly of Free Church of Scotland* v. *Lord Overtoun* [1904] A.C. 515.
2 " Moral Personality and Legal Personality," in *Selected Essays*, p. 237.
3 [1955] 3 W.L.R. 788.
4 [1954] 1 Ch. 479, C.A., in [1954] C.L.J. 162.
5 (1915) 84 L.J.K.B. 2236; 113 L.T. 1055.

Court of Appeal had held that a member, wrongfully expelled by his trade union, could not recover damages from it. The Musicians' Union appealed against that part of the judgment of Upjohn J. which granted the declaration and injunction, and Mr. Bonsor cross-appealed against the dismissal of his claim for damages. The Court of Appeal [6] was unanimous in dismissing the Union's appeal, but it was by a majority [7] that the court dismissed the cross-appeal. It was from the dismissal of Mr. Bonsor's cross-appeal only that appeal was made to the House of Lords, the respondent union not appealing further against the declaration and injunction, so that the sole question before the House was whether Mr. Bonsor [8] was, in law, entitled to damages against the union for his wrongful expulsion.

Before considering the nature of the claim to damages, it may be observed that actions for a declaration and an injunction have both been used with success in recent years by plaintiffs who have been wrongfully expelled from membership of trade unions and similar associations.[9] Thus in *Lee* v. *The Showmen's Guild of Great Britain*,[10] the plaintiff obtained such a declaration where his trade union purported to expel him for conduct which did not in fact or in law constitute the kind of offence for which, by the rules, he might be expelled. Similarly in *Abbott* v. *Sullivan*,[11] the plaintiff successfully claimed a declaration that the removal of his name from a register of cornporters was wrongful. His offence was that he assaulted a trade union official in the street, but this was something wholly unconnected with the domestic matters affecting cornporters, which were the only affairs in respect of which the disciplinary committee might order the removal of a member's name. Furthermore, these two remedies are available not only in those cases where the plaintiff is expelled for conduct which is not a violation of any of the rules of the association, but also where expulsion is ordered by some person or body having no authority so to do. *Barnard and Others* v. *The National Dock Labour Board and Another* [12] is an illustration of this situation. The plaintiffs were registered dock workers who refused to obey a lawful order of their employers and for such conduct they were liable to be suspended from work if an order to that effect were made by the London Dock

[6] [1954] 1 Ch. 479, C.A.
[7] Sir Raymond Evershed M.R. and Jenkins L.J.; Denning L.J. dissenting.
[8] Mr. Bonsor died on February 18, 1954, a few days before the Court of Appeal delivered judgment, but the court antedated its order to February 16.
[9] For an illustration of the difficulties which may arise when the plaintiff claims both damages and a declaration, see *Vine* v. *National Dock Labour Board* [1956] 2 W.L.R. 311, C.A.
[10] [1952] 2 Q.B. 329, C.A.
[11] [1952] 1 K.B. 189, C.A.
[12] [1953] 2 Q.B. 18, C.A.

Board. In fact, the order suspending them was made, not by the Board, but by the Port Manager who had no authority in the matter. The Court of Appeal were unanimous in granting a declaration that the suspension was unlawful, Denning L.J., saying " The Port Manager . . . is in the position of a usurper . . . he has assumed a mantle which was not his, but that of another." [13]

In so far as the Court of Appeal in *Bonsor's* [14] case upheld the grant of a declaration and an injunction, it is to that extent no more than a further illustration of a principle which is now well established.[15] Armed with the declaration that his expulsion was null and void and with the injunction restraining the union from acting upon it, the successful plaintiff may well find in them all the remedy he needs [16]; for these should speedily restore him to the enjoyment of his membership, at any rate until the union, through its proper agencies and for proper reasons, chooses to expel him in strict accordance with the rules. It is obvious, however, that during the currency of the unlawful expulsion order, the member may have suffered considerable pecuniary loss, for where his trade union is what is generally known as a " closed shop " union, it will be virtually impossible for him to obtain employment in perhaps the only trade or profession he understands. This was strikingly illustrated in *Bonsor's* case where, after his expulsion, Mr. Bonsor was unable to obtain employment as a musician, except for a short-term engagement with a non-union orchestra, and at one time was reduced to accepting employment to remove rust from a Brighton pier. In such circumstances, is the plaintiff entitled to the further remedy of damages to compensate him for his loss? This as we have seen, was the sole question before the House of Lords in *Bonsor's* case and it is now necessary to examine the basis of such a claim and the difficulties attendant upon it when an unincorporated association, such as a trade union, is the defendant.

The nature of these difficulties, naturally, depends on the legal basis put forward to establish the claim to damages, for, in theory at least, it is necessary to consider whether the claim should be founded in tort or in contract. If a plaintiff in the position of Mr. Bonsor contemplated bringing an action in tort then, whether

[13] *Ibid.*, at p. 42.
[14] [1954] 1 Ch. 479, C.A.
[15] *Yorkshire Miners' Assocn.* v. *Howden* [1905] A.C. 256; *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540; *Kelly* v. *National Society of Operative Printers' Assistants* (1915) 84 L.J.K.B. 2236; *R.* v. *Cheshire County Court Judge & United Society of Boilermakers, Ex p. Malone* [1921] 2 K.B. 694; *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* [1922] 2 A.C. 440.
[16] If the union, in defiance of the court's order, refuses to restore the member to his rightful position, proceedings in contempt would presumably lie against the appropriate officers; but no reported instance can be found of such proceedings.

he brought his action against the trade union itself or against those members of the association who ordered, or acted upon, the wrongful expulsion, he must first establish that wrongful expulsion, as such, is a tort. It seems reasonably clear, however, that such conduct is not, as yet, recognised as tortious in English law. In *Parr* v. *Lancashire and Cheshire Miners' Federation* [17] Neville J. said, "the expulsion of a member is not a tortious act . . . but is founded upon a breach of the contractual obligations that exist between the plaintiff and the other members of the association," [18] and in *Bonsor's* case the claim throughout was, in effect, treated as one for damages for breach of contract.

If then the claim is contractual it is necessary to answer three questions: who are the contracting parties? where are the terms of the contract to be found? what is the term of the contract which has been broken? The answers to the last two questions appear to be reasonably clear; the terms of the contract are to be found in the rules of the union; and when a member is wrongfully expelled, the term which is broken is an implied term that a member shall not be expelled otherwise than in accordance with the rules.[19] But it is the first question which is crucial, for there are two possible answers. Either, that Mr. Bonsor, as one party, contracted with his fellow union members; or, alternatively, that Mr. Bonsor, as one party, contracted with the trade union as an entity separate and distinct from the members. The answer to the question therefore involves the further inquiry whether a trade union is a "juridical person" or an "entity" capable of contracting. In seeking an answer to this question, it will be convenient at this point to examine briefly the decision in *Kelly's* case, by which the Court of Appeal in *Bonsor's* case considered themselves bound.[20]

[17] [1913] 1 Ch. 366 at 374. To the same effect are the judgments in *Abbott* v. *Sullivan* [1952] 1 K.B. 189, C.A., at p. 193 *per* Evershed M.R., at p. 200 *per* Denning L.J., and at p. 216 *per* Morris L.J. See also *Kelly's* case (note 5, *ante*) *per* Phillimore L.J. at p. 2238; and *Baker* v. *Jones* [1954] 1 W.L.R. 1005.

[18] Even if it was recognised as a tort, no action would lie against the trade union because of the provisions of the Trade Disputes Act, 1906, s. 4 (1): "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." Of this provision Darling J. in *Bussy* v. *Amalgamated Society of Railway Servants* (1908) 24 T.L.R. 437, said: "From the humiliating position of being on a level with other lawful associations of His Majesty's subjects the statute of 1906 has relieved all registered trade unions and they are now *super legem* just as the medieval Emperor was *super grammaticam*." The personal liability of the individual tortfeasor is unaffected by this section, though he may be protected in respect of acts falling under s. 3 of that Act.

[19] [1955] 3 W.L.R. 788 at p. 796 *per* Lord Morton of Henryton.

[20] Lord Morton of Henryton (at p. 790–791) and Lord Porter (at p. 797) state categorically that *Kelly's* case is indistinguishable from *Bonsor's* case and that the Court of Appeal were bound to follow the earlier precedent.

Kelly, who was a printer's assistant and a member of the defendant association, a registered trade union, was wrongfully expelled by a resolution of a committee of the union. He sought a declaration that their resolution was *ultra vires* and void, an injunction restraining the union from acting upon it and damages of £68 for loss of employment. In the county court he succeeded on all three claims, but the Court of Appeal, while upholding the grant of the declaration and injunction, held that he could not recover damages. In *Bonsor's* case, therefore, their Lordships are concerned to determine the true *ratio decidendi* of *Kelly's* case. Lord Morton [1] considers that it is to be found in the following passage of the judgment of Phillimore L.J.[2]:

> "With whom did the plaintiff contract? Not, I think with the trade union, which . . . is merely an unincorporated society of individuals. I think the plaintiff contracted with each and every of the members, and if anybody has broken any contract with him, it is each and every member. Further the officers of the society are agents for him quite as much as for the other members, and if he sues the trade union for what it has done, he is suing himself among others." [3]

Now there are two ways out of the difficulty created by the decision in *Kelly's* case, each of them providing a different answer to our crucial question "who were the contracting parties?" One method is to say that in *Kelly's* case (and therefore in *Bonsor's* as well) the contract was between the plaintiff and the trade union as a separate juridical person, distinct from its members. The other is to deny that a trade union is a distinct legal person but, while accepting, as *Kelly's* case decided, that the contract is between one member and his fellow members, nevertheless to challenge the validity of the reasoning by which the court refused the plaintiff's claim to damages. Both methods, it is to be observed, involve a decision overruling *Kelly's* case, and this is in fact the outcome of their Lordships' opinions in *Bonsor's* case. The direct attack, by the first method, is made by Lord Morton [4] and Lord Porter.[5] They

1 At p. 791.
2 (1915) 84 L.J.K.B. 2236 at p. 2238.
3 Lord Porter (at p. 797) and Lord Keith (at p. 818) also appear to accept this as the true *ratio*. Lord MacDermott (at p. 813) considers that the words of Phillimore L.J. ". . . and if he sues the trade union for what it has done, he is suing himself among others," do not form part of the *ratio* which, he says, is to be found in that part of the headnote which reads: "A member of a trade union who has been illegally expelled by the Committee . . . cannot recover damages for breach of the contract contained in the rules, since the committee who were responsible for breaking the contract were acting as agents for the plaintiff equally with his fellow members."
4 At p. 791.
5 At pp. 799–800, "If, however, there has been, as I think there was, a thing created by statute, call it what you will, an entity, a body, a near corporation,

are of the opinion that a trade union is a legal entity distinct from its individual members, and that it is with that entity that a member contracts. "In my opinion," says Lord Morton,[4] "the action in *Kelly's* case was an action by a member against his union as an entity recognised by the law and distinct from the individual members thereof, for breach of a contract between the plaintiff and his union. If this is so, the foundation for the refusal to award damages is gone." Once it is accepted that a trade union is a distinct *persona juridica* with which Mr. Bonsor is in contractual relationship, then, as soon as the union breaks its contract by wrongfully expelling him, the union, as such, is liable in damages for the consequential harm. Both Lord Morton and Lord Porter in arriving at their conclusion that a trade union is a distinct entity, rely substantially on the decision of the House of Lords in *Taff Vale Ry.* v. *Amalgamated Society of Railway Servants.*[6] In that case a registered trade union was held liable in tort for the wrongful conduct of its servants, and though the practical importance of the decision was much reduced by the later Trade Disputes Act, 1906,[7] that Act did not affect actions for breach of contract and left undisturbed the underlying principle of the *Taff Vale* case, namely, that an action for damages may be maintained against a trade union as such, and the damages payable out of the funds of the union. Had the action in the *Taff Vale* case been against all the members of the union, then, their argument proceeds, one would have expected some treatment of the difficulty which must inevitably have ensued from the fact that the individuals composing the association would have changed since the act complained of was done, both by new members joining and others ceasing to be members. Furthermore, one would have expected the order for payment of damages to be made against the members individually and not against the trade union itself.[8]

On the other hand, Lord MacDermott, Lord Keith of Avonholme and Lord Somervell of Harrow are of the opinion that a

which, by statute, has, in certain respects, an existence apart from its members, then I do not see why that body should not be sued by one of its members for a breach of contract."

6 [1901] A.C. 426. Lord Morton regards this case as the keystone of his opinion: "In my view, the *Taff Vale* case goes far to decide the question now before your Lordships' House" (p. 794).

7 See note 18.

8 Lord Morton and Lord Porter both find additional support for their view in the opinions of Uthwatt J. and Scott L.J. in *National Union of General & Municipal Workers* v. *Gillian* [1946] K.B. 81, especially in the judgment of Scott L.J. at pp. 84–85, where he says, of counsel's argument that a registered trade union is neither a natural person nor a corporation and therefore can have no existence, "that argument is, however, fallacious. There is a *tertium quid*. A trade union has many activities: it has some existence, and it is something."

trade union is not a distinct *persona juridica* and that the contract of membership, constituted by the rules, is between the member and his fellow members.[9] It is in the speech of Lord MacDermott,[10] however, that one finds the opposing arguments marshalled and weighed with meticulous care. He observes at the outset that if a registered trade union is a juridical person, it must be in consequence of the Trade Union Act, 1871, which provided for their voluntary registration, and he proceeds to examine these statutory provisions. His opinion is that the legislature, in providing for registration and in conferring privileges, intended "to bestow on registered unions some of the gifts and attributes of legal personality but had no intention of doing more and was, indeed, averse to the idea of going the whole length and making those unions new creatures, distinct in law from their membership."[11] Thus, the Act of 1871 provides for the vesting of the property of the trade union in trustees and empowers them to sue and be sued in respect of it; had it been a juridical person it ought, presumably, to have been able to hold its assets in its own name and to sue and be sued without the necessity for these special statutory powers. And "the comparative ease with which the garb of registration may be donned and doffed hardly accords with the view that each change means the taking up or laying down of a legal personality." Even more important, he says, is the fact that Parliament has made no effort to incorporate the registered trade union. If it thus "studiously avoids a familiar and appropriate method without purporting to adopt another in its stead, its intention to reach that result may well be open to doubt." This being his view of the statutory provisions, Lord MacDermott then examines the various expressions of judicial opinion[12] which were relied on as supporting the view that a trade union is a juridical person. In so far as they recognise

[9] Lord Keith (at p. 815) says: "I think that the decisions of this House show that, in a sense, a registered trade union is a legal entity, but not that it is a legal entity distinguishable at any moment of time from the members of which it is at that time composed. It remains a voluntary association of individuals, but it is capable of suing and being sued in its registered name; . . . As an association, its membership is constantly changing, but as a registered trade union, it has a permanent identity and represents its members at any moment of time. It would not, I think, be wrong to call it a legal entity." Later (at p. 817) he says: "Mr. Bonsor's contract of membership was a contract between himself and the other members of the union . . . it may be regarded also as a contract with the trade union, for the trade union, in its registered capacity, is representative of all the members. So long as this is kept in view, it is convenient to talk of a member's contract of membership as a contract with his trade union." Lord Somervell (at p. 822) says of the rules which constitute the contract: "I would not, myself, construe them as having any other legal basis than a contractual one between members."

[10] pp. 800–815.

[11] p. 810.

[12] Particularly in the *Taff Vale* case; *Osborne* v. *A.S.R.S.* [1909] 1 Ch. 163 at p. 191; *A.S.R.S.* v. *Osborne* [1910] A.C. 87 at pp. 93 and 102.

that the legislature has conferred on trade unions some of the characteristics of a juridical person or establish that a trade union as such may be sued, they still, he says, fall short of establishing the proposition of full juristic personality. Nevertheless, if, as he suggests, a trade union remains a voluntary association of persons, a plaintiff who seeks a remedy against such a body is faced with a formidable hurdle in deciding against whom he should proceed. And the real importance of the *Taff Vale* decision, in Lord MacDermott's opinion, is that it removed this obstacle in the case of a registered trade union when it held that Parliament had allowed it to be sued in its registered name. The anomaly, which is no greater here than when a partnership is sued in the firm name, is that proceedings at law are sanctioned in a name which is not that of a juridical person. Anomalous as this may be, there can be little doubt that, as a procedure, it is a convenient aid to the administration of justice.[13] It is clear that the union, as such, is the proper defendant in cases where the wrongfully expelled member has sued for a declaration and injunction regarding his expulsion. Can the union, nevertheless, resist an action for damages for the breach of contract on the ground put forward by the Court of Appeal in *Kelly's* case, namely, that the committee who ordered the expulsion were acting as agents for the plaintiff equally with his fellow members? Of this argument Denning L.J. in *Bonsor's* case had said, "I cannot understand this line of reasoning. I cannot understand how it can be said that the committee, when they were excluding the plaintiff . . . were acting as agents on his behalf. They were acting against him, not for him."[14] And Lord MacDermott agrees in thinking that this argument is fallacious, for to say that the act of wrongful expulsion is one "done on behalf of the person expelled is an unwarranted extension of the agency and quite out of keeping with reality." It is because of this fallacy in its reasoning that he considers that *Kelly's* case was wrongly decided[15] and that, in law, nothing stands in the way of an award

[13] In the *Russian Bank Case* [1936] A.C. 403, Lord Macmillan, speaking of a somewhat analogous anomaly, said: "A legal system which for so long admitted as suitors in its courts those wholly fictitious persons John Doe and Richard Roe . . . might be expected to suffer with equanimity the apparition, at the bidding of the Legislature, of a dissolved company as a plaintiff."

[14] [1954] 1 Ch. 479 at p. 513.

[15] At p. 814. Lord Keith (at pp. 818–819) says, "If the expulsion takes place on the initiative of the union officials, it appears to me that it reduces the position to an absurdity to say that the officials were acting as the expelled member's agents in the matter of the expulsion." Similarly Lord Somervell (at p. 822) considers that "it cannot be right to identify the plaintiff with those of whose acts, or of whose agents acts, he complains so as to deprive him of his ordinary remedies. If the union, in its registered name is the proper defendant for a declaration and injunction, it is the proper defendant also in a claim for damages."

of damages to Mr. Bonsor and the assessment of these is remitted to the Chancery Division.

The importance of *Bonsor's* case no doubt lies in the fact that, for the first time, a registered trade union is held liable to pay damages out of its funds to one of its members who, in breach of his contract, has been unlawfully expelled. Its importance is in no way lessened by the fact that it will afford the student another nice exercise in the art of seeking the true *ratio decidendi* of a case, for though their Lordships are unanimous in holding the union liable, by a majority of three to two,[16] a registered trade union is still not a legal person. In any event, a consideration of the opposing arguments advanced in this case will prompt a reflection on the wealth of meaning contained in a remark of a former Prime Minister. Maitland[17] records that during the course of a debate in the House of Commons in 1904 Mr. Balfour referred to trade unions as "corporations," only to be interrupted by a distinguished lawyer on the Opposition benches with, "The trade unions are not corporations." To which Balfour replied, "I know; I am talking English, not law." But apart from this, two further questions arise as to the practical consequences of this decision. The first, and the wider in import, is whether *Bonsor's* case has opened up a wide field of new liability for a trade union on other, and perhaps more important, contracts. The second, but narrower, question is whether there are available to the union any avenues of escape from the actual decision itself. Both questions are clearly of great importance to trade unions and though the scope of this article does not permit a detailed treatment of either, some suggestions as to the lines on which an answer to them might be sought may assist in bringing the decision into a proper perspective.

As to the first question, it is important to keep in mind that the liability of a trade union in respect of the more important contracts with which it is concerned turns to a great extent, but not exclusively, on the provisions of the Trade Union Act, 1871,[18] particularly in sections 3 and 4. The latter section provides: "Nothing in this Act shall enable any court to entertain any legal

[16] The headnote to the All England Report of the decision ([1955] 3 All E.R. 518) puts Lord Keith alongside Lord Morton and Lord Porter in their view that a registered trade union is a legal entity. It is suggested that this is wrong and that Lord Keith arrived at his decision by the arguments which found favour with Lord MacDermott and Lord Somervell.

[17] *Selected Essays*, p. 224. Maitland would probably have considered *Bonsor's* case as supporting his view that our law "muddles along with semi-personality and demi-semi-personality towards convenient conclusions" (*ibid.*, p. 237).

[18] Trade Union Act, 1871, s. 3: "The purposes of any trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust."

proceedings instituted with the object of directly [19] enforcing or recovering damages for the breach of any of the following agreements, . . . " [20] The opening words of this section merit special attention. Though " nothing in the Act " is to enable a court to entertain certain proceedings on the agreements there set out, the section does not affect the enforceability of similar or other agreements on which proceedings might have been brought without the assistance of the Act. When might such proceedings have been brought? The answer seems to be that if the trade union was lawful at common law, section 4 does nothing to prohibit the court from exercising a jurisdiction which it could have exercised before the Act.[1] Where, however, the trade union was unlawful at common law (generally because its purposes were in restraint of trade), section 3 now expressly provides that, for this reason alone, its purposes shall not be unlawful and that its agreements shall not thereby be rendered void. But having had its agreements " validated " as it were by section 3, section 4 then proceeds to prohibit the court from exercising jurisdiction over those agreements which it sets out.

Now, in *Bonsor's* case, counsel for the union conceded [2] that an action by a member for damages for wrongful expulsion was not caught by the provisions of section 4, and while Lord MacDermott regarded the point as having been " very rightly " conceded, he nevertheless thought that by this section Parliament intended to keep contracts of union members respecting the main purposes of their combination outside the jurisdiction of the courts. But perhaps the most important type of agreement, about which there may now be uncertainty in view of *Bonsor's* case, is the " collective agreement " [3] negotiated between a trade union of employers and

[19] There has been much litigation on the meaning of the word " directly "; see Citrine, *Trade Union Law*, pp. 95–102.

[20] Of the agreements which are then enumerated, the following are relevant to the point now being made: " (1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed; (2) any agreement for the payment by any person of any subscription or penalty to a trade union; " " (4) any agreement made between one trade union and another."

[1] See, for example, *Swaine* v. *Wilson* (1889) 24 Q.B.D. 252. This question has been dealt with in detail by Professor Kahn-Freund, "The Illegality of a Trade Union," (1944) 7 M.L.R. 192.

[2] *Per* Lord MacDermott at pp. 803, 812. Lord Keith (at p. 819) says that " a member of a registered trade union who has been damnified by breach of his contract of membership is entitled . . . to sue his union for damages, provided his claim is not struck at by any of the provisions of s. 4 of the Act of 1871." The point seems to have been argued in *Kelly's* case, but Bankes L.J. said: " In the view I take of this case, it is not necessary to consider whether the plaintiff's claim for damages is met by the provisions of s. 4 of the Trade Union Act, 1871 ": (1915) 113 L.T. 1055, 1058.

[3] The most valuable treatment of the legal implications of these agreements is to be found in the writings of Professor Kahn-Freund to which I am much

a trade union of employees. Such an agreement would not come within the ambit of section 4 (1), for it is not an agreement "between members of a trade union as such," but it would certainly come within section 4 (4) as being an agreement "between one trade union and another," [4] and would be an agreement in respect of which the Act of 1871 has not "enabled" any action for damages to be brought against the union if it should act in breach of that agreement. These "collective agreements" are sometimes negotiated, however, between an employees' association and an individual employer, and in this case the agreement would not be struck at by section 4 (4), since it is not between trade unions, nor by section 4 (1) since it is not an agreement "between members of a trade union as such." Does such an agreement stand outside the Act as a valid legal contract enforceable at the instance of the employers against the trade union if, in breach of the agreement, the union refused to abide by the procedure agreed on for the settlement of disputes? On this question of the enforceability of such "collective agreements" there appears to be no actual judicial decision but Professor Kahn-Freund [5] had suggested several substantial arguments to show that such agreements are not legally enforceable contracts but that they are a species of agreement "intended to be binding in honour only." As he points out, where the collective agreement is negotiated between two trade unions, the parties, in the first place, are laying down a code of rules relating to rates of pay and hours of work and such like which are to be observed not by themselves but by individual employers and employees, such terms being subsequently incorporated in their contracts of employment. But apart from creating "a code for the trade," these collective agreements also contain a contractual element in that, expressly or impliedly, the negotiating parties promise each other "not to resort, during the currency of the

indebted: see his article "Collective Agreements under War Legislation," 6 M.L.R. 112, and especially his chapter on "Legal Framework" in Flanders & Clegg, *The System of Industrial Relations in Great Britain* (Chap. 2).

[4] It is important to observe that the statutory definition of a "trade union" embraces not only an association of workmen but also an association of employers which pursues any one or more of the statutory objects; Trade Union Act, 1913, s. 1 (2) and s. 2 (1). A trade union may be defined as any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members. See Citrine, *Trade Union Law*, p. 296.

[5] Flanders & Clegg, *The System of Industrial Relations in Great Britain* (Chap. 2 by Professor Kahn-Freund). He refers to three cases in which there are conflicting and not very clear dicta: *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 732, at 742; *Smithies* v. *National Association of Operative Plasterers* [1909] 1 K.B. 310 at 327, 337 and 340; and *Young* v. *Canadian Northern Ry.* [1931] A.C. 83 at 89.

agreement, to strike or lockout for the sake of changing the terms agreed upon." It is only if this aspect of the collective agreement gives rise to true contractual rights and duties that the liability of the trade union in damages for breach of contract may conceivably have been widened by *Bonsor's* case. And it must be repeated that if the agreement is negotiated between two unions (as distinct from one between a single employer and a union) the Act of 1871 has not "enabled" any action for damages to be brought which did not lie apart from the Act.

Our second question is whether there is some practical way out of the actual decision in *Bonsor's* case itself. The fact which needs emphasis here is that Mr. Bonsor succeeded in his claim because he was able to show that the trade union, in not complying with the rules, had broken his contract whereby he had suffered harm; on the other hand, if there are no clear and specific rules as to when, and by whom, a member of an association may be disciplined by that body, the member may find the court very reluctant to imply some such term as "the association promises not to act in excess of its contractual powers." [6] This particular difficulty will not arise, of course, in the case of a union where its relationship with its members is governed by a code of rules which include specific provisions as to expulsion, but there would appear to be at least two possible avenues of escape for the trade union. The first would be to formulate the rules (which, after all, are to be the terms of the contract) in such a way that they are to give rise to no legally enforceable rights. Agreements that are "binding in honour only" are no novelty in our law [7] and it is possible, in theory at least, for the parties here to agree that those of their agreements, not already precluded from the jurisdiction of the courts by section 4 of the Trade Union Act, 1871, should also give rise to no legally enforceable rights.

The second, and equally obvious, avenue of escape would be so to frame the rule which gives power to expel that the matter of a member's expulsion involves a question of pure fact wholly within the discretion of the union.[8] A rule in the form that "a member may be expelled for conduct which, in the opinion of the union, is contrary to the interests of the union," [9] is one out of which there

[6] *Abbott* v. *Sullivan* [1952] 1 K.B. 189, is an example of such a difficulty.

[7] See, for example, *Jones* v. *Vernons Pools, Ltd.* [1938] 2 All E.R. 626; *Appleson* v. *Littlewood* [1939] 1 All E.R. 464; *Rose & Frank* v. *Crompton* [1925] A.C. 445.

[8] See *per* Somervell L.J. in *Lee* v. *The Showmen's Guild of Great Britain* [1952] 2 K.B. 329 at 341.

[9] Compare the familiar provision of s. 40 of the Army Act, whereby a person subject to military law is punishable if guilty of "any act, conduct, disorder or neglect to the prejudice of good order and military discipline."

cannot emerge an expulsion for a reason which is wrong in law or in breach of some rule. The courts have said more than once that in such cases they will not act as a court of appeal from such a decision of fact and will not substitute their opinion for that of the determining body even though the court might have reached a different conclusion. Indeed, there is no objection to a rule which leaves the initial determination of a question of law to a tribunal agreed to by the parties. But if the rule proceeds to make that tribunal the final arbiter on such a matter, then, in so far as it purports to exclude the jurisdiction of the courts on questions of law, it is to that extent void as being contrary to public policy.[10]

To attempt to secure changes of union rules along either of these lines would meet with the gravest practical difficulties and would do nothing towards a permanent or practical solution of this particular conflict. Lord Justice Scrutton once said,[11] "There must be no Alsatia in England where the King's writ does not run." But if the relationship between a member and his trade union is destined to develop along either of the lines suggested, the law may find that, in its recognition of a trade union as a "near corporation," it is committed also to the recognition of a "near-Alsatia." It has been observed,[12] with much truth, that the first duty of a lawyer in discussing the legal aspects of industrial relations is to warn his readers not to over-estimate its importance; for reliance on legal sanctions for the enforcement of rights and duties between employers and employees is not a sign of strength and may be a symptom of an actual or impending breakdown.

[10] *Baker* v. *Jones* [1954] 1 W.L.R. 1005 where Lynskey J. held that the proper interpretation of the rules themselves was a question of law and so could not be excluded from the jurisdiction of the courts. See also *per* Denning L.J. in *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 at 342.

[11] *Czarnikow* v. *Roth* [1922] 2 K.B. 478 at 488–489; he goes on "without attempting precisely to define the limits within which an agreement not to take proceedings in the King's courts is unenforceable, I think an agreement to shut out the power of the King's courts to guide proceedings of inferior tribunals without legal training *in matters of law* before them is calculated to lead to erroneous administration of law, and therefore injustice, and should therefore not be recognised by the courts." It is to be observed, however, that in neither of the two methods, suggested above, by which trade unions may protect themselves, does any "matter of law" arise.

[12] Kahn-Freund, *op. cit.*

THE INCIDENCE OF GENERAL PECUNIARY LEGACIES

E. C. Ryder *

The Old Law and The Statute

Before the coming into force of the 1925 legislation it was possible to state with reasonable certainty the rules for determining which of the assets comprised in a testator's estate could be used for paying general pecuniary legacies and in what order such assets ought to be applied for that purpose. The pecuniary legatee was, in the absence of any indication in the will of a contrary intention, entitled to have his legacy satisfied out of one portion only of the testator's assets, his general personal estate, that is to say, his personalty not specifically bequeathed. It was immaterial whether such personalty was the subject of an effective residuary gift, or was not effectively disposed of by the will: and if the testator had given his residuary personalty in shares and the gift of any share failed, by reason of lapse or otherwise, so that there was an intestacy as to that share, the legacies were still payable out of the whole of the residuary personalty before division, so that the share which was not effectively disposed of bore the burden *pari passu* with the other share or shares, the gift of which did not fail.

Consequently, the general pecuniary legatee clearly had no right to be paid out of any part of the real estate, whether included in an effective specific or residuary devise or undisposed of, in the absence of any indication of a contrary intention on the part of the testator. In this connection, two well-known rules of construction were established which require particular mention.

(1) It was laid down in *Greville* v. *Brown* [1] that where there was a gift of the residue of the testator's personalty and realty as one mass, he was to be taken prima facie to have intended to charge the realty with the pecuniary legacies in aid of the personalty: the personalty, that is, was the primary fund for payment of the legacies, but the legatees could have recourse to the realty if and to the extent that the personalty proved insufficient: the reason being that, by giving the whole of the residue as one mass, the testator showed that he intended the legacies to be treated as a deduction from that mass.[2]

* Of Gonville and Caius College, M.A., LL.B.; Professor of Law, King's College, Newcastle upon Tyne in the University of Durham.

[1] (1859) 7 H.L.C. 689.

[2] See *Greville* v. *Brown*, *supra*, at p. 697; *Elliott* v. *Dearsley* (1880) 16 Ch.D. 322 at p. 327.

(2) Where the testator had created a mixed fund, consisting of residuary realty and residuary personalty, to answer the legacies bequeathed by the will, the burden was borne by the realty and personalty *pari passu* in proportion to their respective values: the rule was so laid down in *Roberts* v. *Walker*,[3] and appears to be simply a particular application of the general rule that where two or more properties are subject to a common charge, the burden of the charge must be borne by those properties *pro rata*.

This was the position before the coming into force of the Administration of Estates Act, 1925. The question that arises is how far the situation was affected by sections 33 and 34 of that Act and by Part II of the First Schedule thereto. Section 33 (1) provides that on the death of a person intestate as to any real or personal estate such estate shall be held by his personal representatives on trust for sale and conversion: then by subsection (2) it is provided that out of the net proceeds of sale and conversion the personal representative "shall pay all such funeral and testamentary expenses debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this part of this Act and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased." Subsection (7) provides that where the deceased leaves a will the section has effect subject to the provisions of the will.

The relevant portion of section 34 is subsection (3), which reads, so far as material: "Where the estate of a deceased person is solvent his real and personal estate shall subject to . . . the provisions if any contained in his will be applicable towards the discharge of the funeral testamentary and administration expenses debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to the Act." Part II of the First Schedule is headed "Order of Application of Assets where the Estate is Solvent" and begins:

> "1. Property of the deceased undisposed of by will subject to the retention thereout of a fund sufficient to meet any pecuniary legacies. 2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies so far as not provided for as aforesaid."

Paragraphs 3 and 4 mention respectively property specifically

[3] (1830) 1 R. & My. 752.

appropriated or given for and property charged with the payment of debts: neither paragraph contains any reference to legacies. Paragraph 5 reads: "The fund if any retained to meet pecuniary legacies." Paragraphs 6 and 7 (specific gifts and property appointed under a general power) of course contain no reference to legacies. Paragraph 8 contains a provision that the order may be varied by the will of the deceased.

The Problem

These provisions have replaced the old rules for the application of assets in payment of *debts* by an entirely new set under which undisposed-of property (realty and personalty) is the primary fund and property comprised in a residuary gift (realty and personalty) is the secondary fund. The question which arises is: have they done a similar thing in relation to *legacies*?

Now subsection (3) of section 34 says nothing at all about legacies: it simply prescribes an order—that set out in Part II of the First Schedule—for the application of assets in payment of expenses, debts and liabilities payable out of the estate. There can be no doubt that the expression "liabilities" in this context does not include pecuniary legacies: a "liability" payable out of the estate involves a claim on the part of someone against the estate, as distinct from a right to participate in the distribution of the net estate, which is all that a pecuniary legatee has. On the other hand, pecuniary legacies *are* mentioned in Part II of the First Schedule: the types of property specified in paragraphs 1 and 2 of Part II respectively are only to be applied in payment of debts, etc. "subject to" the retention thereout of funds for pecuniary legacies. It is possible to read these words as altering, by a side-wind, the rules about legacies: their effect, it can be argued, is that if there is undisposed-of property whether realty, personalty or both, the personal representative must, before he uses any of it to pay the debts, etc., set aside out of it a fund which will be sufficient to discharge the pecuniary legacies. That fund he is obviously intended to use for that purpose, for otherwise there would be no point in telling him to set it aside: the result being that the primary burden of the legacies is cast on the undisposed-of property. If there is no undisposed-of property, or not enough to provide for the debts and legacies in full, the personal representative must resort to property (real or personal or both) included in the residuary gift; if the legacies cannot be met in full out of the undisposed-of property, a legacy fund must be set aside out of the residuary property before any debts are paid out of it, and here

again (the argument will run) it must be intended that the fund so set aside shall be used for the purpose of paying legacies, unless, of course, it has to be resorted to, in its turn, to meet liabilities of the estate: so that, in effect, the property comprised in the residuary gift or gifts, whether realty or personalty or both, is made the secondary fund, or if there is no undisposed-of property at all the primary fund, for payment of legacies, irrespective of whether the wording of the will brings it within the rule in *Greville* v. *Brown* or the rule in *Roberts* v. *Walker*.[4]

These conclusions are open to objection. It is singular that such radical alterations in the law on the incidence of the legacies should be made in this indirect fashion: Harman J., who felt constrained in *Re Midgley*[5] to conclude that this was what the Act had done, described it as "a tortuous way of legislating." Again, the setting aside of a legacy fund is, under the provisions of the Schedule, something which is merely incidental to the process of applying assets in discharge of debts and liabilities, and it is therefore difficult to see how the Schedule can affect the incidence of legacies when there are no debts or liabilities to be satisfied out of the types of property described in paragraphs 1 and 2 of Part II. Suppose, for instance, a testator gives specific property to X charged (in exoneration of the remainder of the estate) with all debts, expenses and liabilities, including estate duty so far as it is not a testamentary expense: he then gives pecuniary legacies, devises all the residue of his realty to Y and bequeaths all the residue of his personalty to Z. The specific property is sufficient to discharge all debts, etc., in full. Here there can be no possibility of the personal representative's having to apply any part of the residue in discharge of the debts, etc., and in these circumstances the words "subject to the retention thereout," etc., in paragraph 2 of Part II can have no relevance. It will follow logically that in a case of this type the pecuniary legatees have no right to resort to the residuary realty: they had none under the old law and there is nothing in the Act to give them any. Yet it would be strange if, while the old law applied in a case of this type, the position were entirely different if the debts, etc., or some part of them—perhaps only a few shillings—were payable out of residue.

Can these difficulties be avoided by the adoption of another construction of Part II of the First Schedule? The only alternative view seems to be that the Schedule is not to be read as interfering with the pre-1926 rules as to the incidence of legacies at all: that

[4] See *Re Martin* [1955] Ch. 698 at p. 705, and *Re Midgley* [1955] Ch. 576 at p. 583.
[5] [1955] Ch. 576.

the words " subject to the retention thereout," etc., in paragraphs 1 and 2 are simply put in to indicate that in discharging debts and expenses out of undisposed-of property or residuary property, the personal representative must not leave himself without funds to satisfy the pecuniary legatees, but must retain sufficient to pay legacies out of such parts, if any, of the undisposed-of or residuary estate as, under the general law laid down before 1926,[6] are answerable for legacies. This is the view taken by the learned editors of the 12th and 13th editions of Williams on *Executors*.[7] If the Schedule be thus construed, it harmonises with section 34 and the difficulties mentioned in the last preceding paragraph cannot arise.

It may be objected that if the Schedule was intended to do no more than regulate the application of assets in payment of debts, etc., there was no need to refer to pecuniary legacies at all in paragraphs 1 and 2. But the draftsmen, assuming that this was their only purpose, nevertheless could not have avoided introducing these references to pecuniary legacies. The object of prescribing an order of application of assets for the payment of debts and expenses, is to determine how the burden of liabilities shall be borne as between the various persons beneficially interested in the estate. Pecuniary legatees are so interested: it was therefore necessary that the Schedule should contain provisions for determining their position in the order. But the Schedule consists not of a list of various types of beneficiary, but of a list of various parts of the testator's estate. A pecuniary legacy is not a part of the testator's estate in the sense that property included in a residuary gift or property specifically devised is: the pecuniary legatee simply has a claim to be paid a sum of money out of some portion or portions of the estate. Thus, assuming that the draftsmen wished to do nothing more than give pecuniary legatees priority, as regards the burden of debts, over the various persons entitled to the different portions of the estate enumerated in paragraphs 1 to 4 of Part II, it would still hardly have been possible for them to make no mention of pecuniary legacies in paragraphs 1 and 2 and to draft paragraph 5 in the simple form: " 5. Pecuniary legacies." If Part II of the Schedule was to take the form of a list of classes of the testator's property (and it is hard to see how it could have been drafted in any other way), the only sensible course for the draftsmen to take was to indicate in paragraphs 1 and 2 that the application of the assets therein mentioned in payment of debts was to be subject to

[6] As altered by s. 33 (2) of the Administration of Estates Act, 1925, where applicable: as to which see below.
[7] 12th ed., p. 1110; 13th ed., p. 981.

the claims of the pecuniary legatees and that funds were to be retained to satisfy these claims: such funds, being specific portions of the estate, could be mentioned in paragraph 5 without any illogicality or confusion of thought. The references to pecuniary legacies in paragraphs 1 and 2 were therefore necessary even if the draftsmen wished to do no more than put pecuniary legatees in the fifth category in relation to payment of debts only: those references are thus not inconsistent with the more restrictive interpretation of Part II of the First Schedule.

There is one further point to be considered before the authorities are examined. Most of the decisions are on cases in which there was a partial intestacy. The effect of section 33 of the Act, where there is a partial intestacy and no contrary intention is indicated in the will, is that the statutory trust for sale and conversion in subsection (1) is applicable to the part of the estate as to which the deceased has died intestate, while the proceeds of sale of that part of the estate are governed by the further trusts in subsection (2), namely a trust for payment of debts, etc., out of the net proceeds and a direction for the setting aside, out of the residue of the net proceeds, of a fund sufficient to provide for pecuniary legacies. Though these provisions may be applicable to a partial intestacy, it seems that they are not necessarily so, for they may be excluded by the will. In particular, the will may contain an express trust for sale and conversion of residue followed by trusts of the proceeds of sale which fail in part: the proceeds may, for instance, be given in shares and the gift of one share may lapse. In such cases it appears that there is no room for the statutory trust for sale mentioned in subsection (1) of section 33 to operate: it is excluded by the will.[8] And where the statutory trust for sale is excluded, the provisions of section 33 (2) will not apply, because those provisions presuppose a sale and conversion under the statutory trust: they have no application to the proceeds of sale and conversion under an express trust. Thus cases of partial intestacy fall into two classes, those in which subsections (1) and (2) of section 33 are applicable, and those in which they are excluded by an express trust for sale (or some other provision) in the will.

Where section 33 applies in a case of partial intestacy, the problem of the incidence of legacies will be complicated by the direction in subsection (2) for the setting aside of a fund sufficient to answer legacies out of the net proceeds of the undisposed-of property. It would be difficult to argue that *this* direction was not intended to affect the incidence of legacies at all: for it is an

[8] *Re McKee* [1931] 2 Ch. 145 (intestacy as to reversionary interest in proceeds of sale).

imperative and independent direction for the setting aside of a fund, not, like the words " subject " etc. in paragraphs 1 and 2 of Part II of the First Schedule, something which can be regarded as incidental to the process of discharging the expenses and debts. On a first impression, therefore, and apart from authority, it seems that the effect of subsection (2), where applicable, is to throw the burden of the legacies primarily on the net proceeds of sale and conversion (after payment of debts, etc.) of undisposed-of property.

The Authorities: Partial Intestacy

Turning now to the decisions upon wills which came into operation after 1925: the first in point of time is *Re Lamb*,[9] where the will contained a direction to pay debts and funeral and testamentary expenses, gifts of pecuniary legacies and a gift of the residue of the real and personal estate to certain persons in equal shares: there was no express trust for sale and conversion of the residue. Some of the residuary beneficiaries predeceased the testator and their shares lapsed. It was held by Eve J. that the lapsed shares were " property of the deceased undisposed of by will " within the meaning of paragraph 1 of Part II of the First Schedule to the Act, and were consequently applicable in the administration of the estate in exoneration of the other shares of residue which, being effectively disposed of, fell within paragraph 2. It appears to have been assumed that legacies were placed on the same footing as debts by Part II of the First Schedule, and Eve J. accordingly declared that legacies as well as debts were payable primarily out of the undisposed-of shares, but the point was not argued or discussed in the judgment, and *Re Lamb*, therefore, cannot be regarded as a satisfactory authority for the proposition that Part II makes undisposed-of property the primary fund for the payment of legacies, particularly as the case was one in which subsections (1) and (2) of section 33 were clearly applicable.

The proposition laid down in *Re Lamb* that a lapsed share of residue is " property undisposed-of " within paragraph 1 of Part II, after being doubted by Lawrence L.J. in *Re Kempthorne*[10] was finally affirmed by the Court of Appeal in *Re Tong*.[11] The reasoning on this point in *Re Lamb* and *Re Tong* seems unanswerable and the law can, it is submitted, be taken as settled in the manner laid down in those cases: thus so far as concerns the payment of *debts*, the old rule applicable when the general personal estate was the primary fund, namely that lapsed shares

[9] [1929] 1 Ch. 722.
[10] [1930] 1 Ch. 268.
[11] [1931] 1 Ch. 202.

stood on the same footing as shares which were effectively disposed of, has now gone by the board. But neither decision justifies the conclusion that the same principle applies in relation to the payment of legacies. The question of the incidence of legacies in similar circumstances arose in *Re Kempthorne*, but that case again throws no direct light on the problem, since the decision was based solely on the wording of the will in question. The reasoning of the judgment of Lawrence L.J. (at p. 298) seems to be based on the assumption that the Schedule, where not excluded by the will, determines the incidence of legacies: but the law is not explicitly so stated either in this or in any of the other judgments.

Re Worthington [12] is of more value as an authority. The testatrix gave pecuniary legacies and devised and bequeathed all the residue of her estate both real and personal to two persons in equal shares absolutely: one of those persons predeceased the testatrix, and her share consequently lapsed and went as on intestacy. The Court of Appeal, reversing Bennett J., unanimously held that the legacies as well as the debts were payable primarily out of the lapsed share, and that this result was produced by the general law, which was not excluded by the wording of the will. The decision is therefore an authority on the general law as to incidence of legacies.

It is not, however, easy to determine exactly what the case decides on this point. In the main judgment, Lord Hanworth M.R. (at pp. 774–775) read section 33 (2) and (7), section 34 (3) and paragraph 1 of Part II and continued:

> "Having regard to those sections and the paragraph of Part II of the First Schedule which I have read, is there any reason for the distinction made by Bennett J. between debts and funeral expenses on the one hand and pecuniary legacies on the other? The learned judge seems to have read the will as providing for the payment of the legacies first and to have thought that the residue was not to be ascertained until after they had been paid. But the provisions of the statute indicate that unless there is some provision in the will which negatives the prescribed order of administration that order of administration must apply both to legacies and debts."

The relevant part of the judgment of Romer L.J. virtually repeats the reasoning of Lord Hanworth. Lawrence L.J. did not express any dissent from these conclusions and his short judgment is not inconsistent with them. At first sight all this seems to mean that the old rules as to incidence of legacies are entirely superseded in every case by the provisions of the Act. The difficulty is that the

[12] [1933] Ch. 771.

case was one in which section 33 was applicable, and the conclusions stated in the judgments of Lord Hanworth M.R. and Romer L.J. were expressed to be based on section 33 as well as on section 34 and Part II of the First Schedule.[13] We have seen that section 33 clearly throws the burden of legacies, in cases to which it applies, primarily upon undisposed-of property. It was therefore unnecessary for the court to go beyond section 33 for the purpose of determining the general law as to incidence of legacies on the facts of *Re Worthington*,[14] and it is possible to regard the references to Part II of the First Schedule as surplusage, and either to read the apparently general rule laid down in the judgments of Hanworth M.R. and Romer L.J. as confined to cases of partial intestacy governed by section 33, or to regard the statement of the general rule as unnecessary for the decision of the case and therefore *obiter* (which is the view taken by the learned editors of Williams on *Executors* [15]). Either view will lead to the same conclusion, namely that *Re Worthington* laid down no general rule but merely stated the law governing cases of partial intestacy governed by section 33. It is submitted that this conclusion is inescapable and that the reasoning which justifies it is that the apparently general rule laid down by Hanworth M.R. and Romer L.J. ought, since they both expressly state that it is based partly on section 33, to be interpreted in the context as applicable only in cases to which section 33 applies. On this view, *Re Worthington* throws no light on whether in cases not governed by section 33, Part II of the First Schedule alters the old law as to incidence of legacies.[16]

The Authorities: No Intestacy

Re Thompson [17] was the first case in which it was considered how far the old law as to legacies was altered by section 34 and Part II of the First Schedule alone. The deceased gave an annuity and pecuniary legacies, made certain specific gifts and devised and bequeathed all his real and personal estate not thereby otherwise devised or bequeathed to certain charities. As the residuary realty and residuary personalty were given as one mass but no mixed fund was created for the payment of legacies, the position under the old law would clearly have been that the realty was available for payment of the legacies, but only in aid of and not *pari passu*

[13] See the discussion in Williams on *Executors*, 13th ed., pp. 980–981.
[14] [1933] Ch. 771.
[15] 13th ed., p. 981.
[16] *Re Sanger* [1939] Ch. 238, in which *Re Worthington* was followed, throws no further light on the problem.
[17] [1936] Ch. 676.

with the personalty: the question in issue (which was of importance in connection with the incidence of death duties) was whether section 34 and Part II of the First Schedule threw the burden on to the realty and personalty *pro rata*. Clauson J. held that the legacies were payable primarily out of the personalty, the realty being liable only in aid of the personalty. This conclusion is not necessarily inconsistent with the view that Part II was intended to alter the incidence of legacies to some extent, that is to say by throwing the burden in the first place upon undisposed-of property where there is a partial intestacy and by making undisposed-of or residuary realty available where it would not previously have been so. Paragraph 2 of Part II contains no indication of how the burden is to be borne as between realty and personalty where the residue consists partly of one and partly of the other, and it would be possible to infer that the intention was to make residuary realty available but not to interfere with the old law in cases falling within the rule in *Greville* v. *Brown*.[18] The reasoning of Clauson J., however, goes beyond this. It was argued by counsel for a pecuniary legatee that section 34 and the Schedule did not affect the incidence of legacies at all: "Section 34 did not purport to deal with legacies at all and they are only dragged into the Schedule. Can a section which has nothing to do with legacies affect the incidence as regards legacies?" Clauson J. appears to have accepted this contention, and to have based his judgment on it. After mentioning the provisions of section 34 and Part II, paragraph 2, he continues (at p. 682):

> "It is suggested that the effect of that provision is to alter the law and to provide that the fund which is to be retained out of residuary realty and personalty in order to meet pecuniary legacies is to be retained in the following way: that a proportionate part is to be retained out of realty and personalty *pro rata* of the amount of the realty and personalty respectively. The provision does not say so and the provision is not concerned with any such matter. The provision is concerned with the way in which funeral, testamentary and administration expenses, debts and liabilities are to be met. There is no indication that there is any intention of altering the law in respect of *the rights of the legatees as against those interested in the residuary personalty and residuary real estate* [19] or in respect of the rights *inter se* of those interested in the residuary realty and personalty respectively as regards bearing the charge of legacies, and I can see no foundation

[18] (1859) 7 H.L.C. 689.
[19] Not italicised in the original.

for the suggestion that that provision has in any way altered the law as laid down in *Re Boards*." [20]

These words can only mean that Clauson J. did not regard the incidence of legacies as being affected at all by paragraph 2 of Part II—or, presumably, by paragraph 1, since exactly the same considerations apply to both paragraphs. But it is to be observed that it was unnecessary to lay down so wide a general rule in order to decide the case: also that *Re Worthington* [1] does not appear to have been cited.

In *Re Rowe* [2] the question arose whether realty disposed of by the will was available at all for paying legacies, in the absence of express provision to that effect in the will. The testator bequeathed specific and pecuniary legacies and continued: "I devise all my real estate and bequeath all the residue of my personal estate to (X and Y) in equal shares." The residuary personal estate was insufficient to discharge the pecuniary legacies in full, and the question arose whether the pecuniary legatees could resort to the realty. Farwell J. held that the case was not within the rule in *Greville* v. *Brown*: on the true construction of the will the realty and personalty were not given in one mass, and consequently before 1926 the legatees would have had no right to payment out of the realty in aid of the personalty. He then went on to consider the effect of paragraph 2 of Part II and expressed himself as agreeing with the general principle laid down in *Re Thompson* [3] by Clauson J. It is somewhat strange that he went on to decide the case on a ground which, though expressed as a logical inference from Clauson J.'s principle, really has nothing to do with it. The material words of the judgment are—

> "I have come to the conclusion, although with some doubt, that the Administration of Estates Act, 1925, has not altered the law as it was before that Act came into operation. It seems to me that in so deciding I am acting in accordance with the principle which Clauson J. adopted in *Re Thompson*. Accordingly I hold that the property of the deceased not specifically devised or bequeathed but included by a specific or general description in a residuary gift for the purpose of Schedule I, Part II, paragraph 2 of the Act does not include the real estate of the testator in this case: for according to the construction which I place upon this particular will the real estate is devised not as part of the residue but as a specific

[20] [1895] 1 Ch. 499.
[1] [1933] Ch. 771.
[2] [1941] Ch. 343.
[3] [1936] Ch. 676.

devise to the named persons, the residue which is given being the residue of the personal estate."

It is clear from these words that Farwell J. regarded the gift of "all my real estate" as specific and not residuary.[4] But once the devise was held to be specific the question whether paragraph 2 of Part II altered the law became irrelevant. Paragraph 2 only applies to residuary gifts: even if it did alter the law by making residuary realty available for the payment of legacies, there would still be no doubt that specifically devised realty was not available for the payment of legacies. There is nothing in Part II which can possibly be construed as making property *specifically* given—whether realty or personalty—available for legacies. It was thus unnecessary to pray in aid the principle laid down by Clauson J. in order to reach the conclusion which Farwell J. reached, and it is submitted that the case is really only authority for the proposition—which requires no authority—that legacies are not payable out of specifically devised realty under the new law any more than they were under the old.

Re Anstead[5] was another case in which the incidence of legacies was only of importance because it affected that of death duties. The testator who died in 1940 gave pecuniary legacies and an annuity, specifically devised certain realty, and gave the residue of his real and personal estate upon certain trusts: there was no trust for sale and conversion of residue and no express direction as to payment of debts, expenses or legacies, apart from the annuity. The residuary personalty, after provision for the annuity in accordance with the express direction, was not sufficient to provide in full both for debts and expenses and for the legacies. The summons raised the question whether any part of the estate duty payable on the realty was chargeable to the pecuniary legacies: to answer this it was necessary to determine whether any proportion of the legacies was payable out of the real estate.[6] Since the residue was given as one mass it was clear, as in *Re Thompson*,[7] that the realty was available if necessary, whether the old or the new law governed the point: what was in issue was simply how the burden ought to be borne as between realty and personalty. In deciding this point, Uthwatt J. followed *Re Thompson*: but he does seem to have regarded paragraph 2 of Part II of the First Schedule as governing the incidence of legacies since 1925. In his judgment, after reading paragraphs 2 and 5 of Part II, he continues:

4 This conclusion seems open to question.
5 [1943] Ch. 161.
6 See *Re Spencer Cooper* [1908] 1 Ch. 130.
7 [1936] Ch. 676.

> "It follows that the first thing to be done in administering a solvent estate is to set aside out of residue a fund to satisfy the pecuniary legacies. That is the first charge and it is a charge primarily on residuary personalty rather than on the residuary real estate: *Re Thompson*. The result is notionally to divide the residue into two separate funds, the first to meet pecuniary legacies (and for the purposes of this fund personal estate is the primary fund and only so far as it is insufficient is there to be any resort to realty) and a second fund consisting of the balance of the residue including residuary real estate. In meeting debts and testamentary expenses the second fund must be exhausted before the first is touched."

He plainly regarded paragraph 2 as the determining factor in a case of this sort: that is to say, he took the view that the realty was made available for the payment of legatees, not, as before 1925 by the rule in *Greville* v. *Brown*, but by the provision in paragraph 2 as to setting aside a fund. But as the point was not argued, the case is really only authority for the proposition that where residuary realty and personalty are given in one mass, the old law as to the primary liability of the personalty to meet legacies is still applicable.

Further Cases on Partial Intestacy

The remaining decisions are all on cases of partial intestacy. In *Re Gillett's Will Trusts* [8] the testator, after bequeathing pecuniary legacies, gave his residuary estate to trustees on trust to sell and convert and pay debts, expenses and duties out of the proceeds. The trustees were directed to invest the net proceeds and pay certain annuities out of the income: the surplus income arising during the continuance of the annuities was undisposed of. Roxburgh J. held that the undisposed-of income was the primary fund for meeting the legacies. It was, however, conceded by counsel and assumed in the judgment that paragraph 1 of Part II of the First Schedule operated to throw the burden of legacies primarily on to undisposed-of property unless a contrary intention appeared in the will, and the argument and the judgment were concerned purely with the question whether the will contained any indication of a contrary intention. The case therefore cannot be regarded as a satisfactory authority for the proposition that paragraph 1 affects the incidence of pecuniary legacies: but so far as it goes it provides support for that view, for the decision cannot be explained away as being really based on section 33 (2) of the Act. The existence of

[8] [1950] Ch. 102.

an express trust for sale clearly prevented that subsection from applying.

It is curious that this decision was not cited in the arguments or judgment in *Re Beaumont's Will Trusts*,[9] the facts of which bore a close resemblance to those of *Gillett*. After making specific and pecuniary bequests the testatrix gave, devised and bequeathed "all my real estate and all my personal estate not hereby otherwise disposed of" to trustees upon trust to sell and convert and after payment of expenses and debts to stand possessed of the residue in trust for division amongst four named persons, one of whom predeceased the testatrix. Counsel for the person entitled to the lapsed share on intestacy put forward the argument that section 34 (3) and Part II of the First Schedule contained nothing to affect the incidence of legacies: that the only part of the Act which did so was section 33 (2), which in the present case was excluded by the express trust for sale in the will. This argument was accepted by Danckwerts J. in a short judgment in which he said: "As Mr. Winterbotham contended, section 34 (3) of the Administration of Estates Act, 1925, has in effect made no provision with regard to such things as legacies . . . the position of the legacies depends on the old law. By that law, that is before the Administration of Estates Act, 1925, legacies would plainly come out of the residuary estate." After citing *Re Thompson*,[10] which he regarded as assisting him in coming to the conclusion stated above, he accordingly held that the legacies were payable out of the whole estate before division: he seems to have regarded the realty as included in the residuary gift.

Re Beaumont's Will Trusts,[11] on the face of it, appears to be clear authority for the proposition that Part II of the First Schedule has no effect on the incidence of legacies. That proposition, however, was rejected by the same judge, Danckwerts J., in *Re Martin*,[12] where the testator bequeathed pecuniary legacies and gave the residue of his personal estate to trustees upon trust to sell and convert, pay the debts and expenses out of the proceeds and stand possessed of the ultimate residue on certain trusts which did not fail. The realty was undisposed of and the question arose whether the legacies ought to be paid out of the undisposed-of realty or the residuary personalty. Danckwerts J. held that they ought to be paid out of the realty, basing his conclusion on the argument that paragraph 1 of Part II requires the setting aside out of undisposed-of property of a fund sufficient to meet the legacies, and that there

[9] [1950] Ch. 462.
[10] [1936] Ch. 676.
[11] [1950] Ch. 462.
[12] [1955] Ch. 698.

would be no object in setting aside such a fund unless it was to be used for the payment of legacies. He treated *Re Thompson* [13] as a decision simply on whether paragraph 2 of Part II altered the old rule as to the primary liability of personalty where legacies are payable out of a residue consisting of realty and personalty given as one mass, not as laying down any general principle that Part II does not affect the incidence of legacies. And he distinguished *Re Beaumont's Will Trusts* [14] on the grounds that in that case (1) there was an express trust for sale extending to the undisposed-of property, and (2) the undisposed-of property was not a particular asset of the estate but a share of the fund given by the will. The view taken by Danckwerts J. of the effect of *Re Thompson* was one which it was open to him to take, though it seems inconsistent with the view which he took in *Re Beaumont's Will Trusts*. But, with respect, it is difficult to understand the reasons given for distinguishing *Beaumont* itself. The importance of the trust for sale in *Beaumont* was that it excluded the provisions of section 33 of the Act: if the decision in *Re Martin* [15] had been based solely on section 33 (*i.e.*, if Danckwerts J. had held that legacies were payable out of the undisposed-of realty not by reason of the provisions of the Schedule but by reason of the directions in subsection (2) of section 33), the presence of a trust for sale excluding section 33 in *Beaumont* would have been a legitimate ground for distinguishing the two cases. In fact, however, in the relevant part of the judgment, section 33 was only referred to in an aside: the conclusions of the learned judge are stated as "the result . . . of the provisions contained in paragraph 1 of Part II of Schedule I." Now if that paragraph is applicable at all to determine the incidence of legacies in a case of partial intestacy, it clearly applies whether there is or is not an express trust for sale extending to the undisposed-of property: nothing in section 34 of the paragraph itself restricts its application to cases where there is no trust for sale.

The reason for the other ground of distinction is not stated in the judgment, and having regard to the rule clearly established by the decision of the Court of Appeal in *Re Tong* [16] and *Re Worthington*,[17] that a lapsed share of residue is property undisposed of for the purposes of Part II of the First Schedule, it is not easy to see why the fact that in *Beaumont* [18] there was an intestacy as to a share, while in *Martin* [19] the intestacy was as to the whole of the

[13] [1936] Ch. 676.
[14] [1950] Ch. 462.
[15] [1955] Ch. 698.
[16] [1931] 1 Ch. 202.
[17] [1933] Ch. 771.
[18] [1950] Ch. 462.
[19] [1955] Ch. 698.

real estate, should make any difference between them. There is one possible explanation of the words used by Danckwerts J., however, but it is acceptable only on the assumption that section 33, and section 33 alone, is the provision which is relevant in considering whether legacies are payable out of the undisposed-of property. Where the property which is undisposed of consists of a share in residue (or in any other fund), and the whole of the residue or other fund is subjected to an express trust for sale and conversion by the will (as in *Re Beaumont*), the trust for sale is not affected by the failure of the disposition of the *share*[20]; consequently, it will be effective to prevent the undisposed-of share becoming subject to the provisions of section 33. If, however, a particular asset or fund is completely undisposed of (as in *Re Martin*[1]) any trust for sale which may be declared in the will in relation to that asset or fund will ordinarily fail as a result of the total failure of its objects,[2] and section 33 (1) and (2) will therefore ordinarily apply in partial intestacies of this type. It is possible, therefore, that when Danckwerts J. said: " . . . there was in that case a trust for sale, and there was not as in the present case an intestacy with regard to a particular asset of the testator's estate, but merely an intestacy with regard to a share of the fund given in the will," he did not intend to specify two separate grounds for distinguishing *Re Beaumont*,[3] but simply meant that *Re Beaumont* was a case in which there was an express trust for sale which was not affected by the failure of the objects of the trust, since that failure was only partial, not total, the intestacy being only as to a *share* of the fund directed to be sold and converted: therefore, the express trust for sale remained operative and excluded section 33 (1) and (2). But, of course, the exclusion of these subsections is quite immaterial if, as held in *Re Martin*, the primary liability for legacies is thrown upon undisposed-of property in any case by paragraph 1 of Part II. If that is correct, therefore, the reasons given in *Re Martin* for distinguishing *Re Beaumont* cannot be valid. It thus appears that the two cases cannot both be correctly decided.

The difficulty of reconciling the two cases became apparent in *Re Midgley*,[4] in which the testatrix, who died in 1951 after bequeathing pecuniary legacies, gave the whole of her residuary estate real and personal upon trust to sell, to pay debts and expenses out of the proceeds, and to hold the net residue on trust for six persons: the gift in favour of one of these persons was

[20] *Re Richerson* [1892] 1 Ch. 379.
[1] [1955] Ch. 698.
[2] *Smith* v. *Claxton* (1819) 4 Madd. 484.
[3] [1950] Ch. 462.
[4] [1955] Ch. 576.

revoked by a codicil and her one-sixth share went as on intestacy. It was held by Harman J. that the pecuniary legacies were payable out of the undisposed-of share. His decision was based entirely on section 34 (3) and Part II of Schedule I, as indeed it had to be since section 33 was clearly excluded by the express trust for sale in the will. He points out in his judgment [5] that section 34 (3) does not on the face of it purport to alter the law about payment of legacies, but he regards the provisions in paragraph 1 of Part II as to the retention of a fund as having this effect; his words are: "What then is to be done with the fund which has been retained thereout? The answer, it seems to me, is that it must be used to meet the pecuniary legacies, because it has been retained for that purpose."

The difficulty attendant upon this reasoning was that the case was closely similar to *Re Beaumont's Will Trusts*,[6] which therefore had to be either disregarded or distinguished. On this point Harman J. said: "The argument that prevailed in *Beaumont's* case was apparently that where there was a trust for sale imposed by the will, that excluded the Act altogether, because it excluded section 33 of the Act. I confess that I do not follow the argument." In saying this he seems to have had in mind the explanation given by Danckwerts J. in *Re Martin* [7] of the grounds on which that case was distinguishable from *Beaumont's* case. He then pointed out that *Gillett* [8] was not cited in *Beaumont*, but avoided a direct refusal to follow *Beaumont* by suggesting that the law might be different—the Schedule might not apply to determine the incidence of legacies—in a case where there was "no intestacy apparent at the death of the testator." These words presumably mean "where the testator appears on the face of his will to have disposed of the whole of his estate but on examination of the circumstances it becomes apparent that his dispositions have partly failed"—which was the situation in *Beaumont's* case. No reason is given for treating this slight difference in the facts of the two cases as significant. The suggested distinction could only be justified by treating "property undisposed of" in Part II of the First Schedule as restricted in its meaning to property which the testator has not purported on the face of the will to dispose of: that interpretation would be quite inconsistent with *Re Kempthorne*, *Re Tong* and *Re Worthington*, and it is therefore submitted, with respect, that Harman J.'s suggestion (it was no more than a suggestion) does not provide a sound basis of distinction between the two cases, and that

[5] p. 583.
[6] [1950] Ch. 462.
[7] [1955] Ch. 698.
[8] [1950] Ch. 102.

Beaumont's case is really irreconcilable with *Re Midgley* as well as with *Re Martin*.

Suggested Resolution

The difficulty of reaching firm conclusions in the present state of the authorities will now be apparent. The following is tentatively submitted as a summary of the present position—

(1) Where there is a partial intestacy and the property undisposed of is not subject to an express trust for sale under the provisions of the will it is clear that section 33 (2) of the Act throws the burden of pecuniary legacies primarily upon the undisposed-of property, whether realty, personalty or both, and it is therefore unnecessary to inquire in such a case whether paragraph 1 of Part II of the First Schedule produces the same effect. "Undisposed-of property" for this purpose includes a share or shares of residuary personalty, residuary realty or residuary estate both real and personal,[9] where the gift of such share or shares has lapsed or otherwise failed, though the remaining shares are effectively disposed of, as well as property (or a share as aforesaid) which the testator has made no attempt to dispose of by his will.

Where there is an intestacy as to the whole residuary real and personal estate, the question may arise whether pecuniary legacies are payable primarily out of the personalty or out of realty and personalty *pro rata*, for to the extent that they are payable out of the realty the burden of estate duty will fall upon the pecuniary legatees themselves. This question has not arisen in any reported case, but it is submitted that realty and personalty ought to be applied *pro rata*. For the effect of section 33 in a case of this sort is to throw both personalty and realty into a mixed fund out of which legacies are in effect directed to be paid.

Where a testator gives a specific asset or his residuary real, personal or real and personal estate to trustees upon trust for sale and declares beneficial trusts of the proceeds which wholly fail, the express trust for sale normally also fails,[10] and the statutory administration trusts in section 33 are consequently applicable to the undisposed-of property.

(2) Where there is a partial intestacy and the undisposed-of part of the estate is, under the provisions of the will, subjected to an express trust for sale which excludes the statutory trusts contained in section 33, the position must still be regarded as doubtful. It is

9 The cases all relate to shares of residue, but on principle the same rule should apply to shares of property specifically bequeathed or devised.

10 See authorities quoted above and *Re Midgley* [1955] Ch. 576 at p. 583, *per* Harman J.

arguable that, having regard to the terms of section 34 (3), Part II of the First Schedule ought to be treated as prescribing an order for the payment of debts and liabilities only, not as affecting the incidence of legacies, and that therefore the reference to setting aside a fund in paragraph 1 does not interfere with the old law. This involves reading the words referring to setting aside a fund as subject to the qualification that the undisposed-of property is only to be used for this purpose so far as it consists of property which under the old law would be available for legacies. It also involves reading the references in *Re Worthington* to Part II of the First Schedule as purely *obiter* and treating that decision as really based on section 33 alone. Finally, it involves treating *Re Gillett* and *Re Midgley* as wrongly decided, disregarding the reasoning in the judgment of Danckwerts J. in *Re Martin* and treating that case too as really governed by section 33 of the Act. On the other hand, the conclusion in question was accepted in *Beaumont's* case and is consistent with the general principle stated in *Re Thompson* (which admittedly was wider than was necessary for deciding that case) and with the views (admittedly *obiter*) expressed by Farwell J. in *Re Rowe*. The fact that pecuniary legacies are mentioned in paragraph 1 of Part II can be explained as something which is unavoidable if an order for the application of assets in payment of debts and liabilities is to be prescribed by setting out a list of different categories of assets: this answers the argument, which was accepted in *Re Martin* and *Re Midgley*, that the reference to the setting aside of a fund in paragraph 1 is meaningless unless it was intended that the fund should be used for paying legacies.

If that argument be thus disposed of, there is really no logical answer to the contention that Part II of the First Schedule ought to be treated as simply laying down a new set of rules as to application of assets in payment of debts and liabilities and nothing more, because its purposes are thus limited by the wording of section 34 (3). It is submitted that this is the correct view and that there is nothing in the authorities to prevent the Court of Appeal (and *a fortiori* the House of Lords) from adopting it. The results in a case of the type under consideration will be (1) that undisposed-of realty will never be available for the discharge of legacies, and (2) that an undisposed-of share of residuary personalty will not be primarily liable for legacies in exoneration of shares effectively disposed of, but will bear only a proportionate share of the burden *pari passu*.

(3) Where the whole of the estate is effectively disposed of, section 33 is clearly not applicable. In such a case residuary realty and personalty may be given as one mass. There is then

no doubt that the realty is available; the only question is whether the residuary personalty is the primary fund. If the reasons set out under head 2 above for treating Part II as having no effect on the incidence of legacies at all are regarded as valid, it will follow that the old law still applies on this particular point and that the personal estate is primarily answerable for legacies, as was held in *Re Thompson*. But even if the general principle is not accepted and the burden of the legacies is regarded as being determined by Part II of the Schedule, it is submitted that the personalty must still be treated as the primary fund (as was held in *Re Anstead*) for there is nothing in paragraph 2 of Part II to alter the old law on this particular point: the paragraph does not appear to create a mixed fund of realty and personalty for the purpose of discharging legacies as section 33 (2) does. From the practical point of view this rule is a most convenient one: the result of casting the burden primarily on the personalty will be that where the value of the personalty is greater than the amount of the legacies (which is what commonly happens) the legacies will be payable entirely out of personalty, and the complications which arise in the administration of an estate when legacies are payable partly out of realty, and have to bear a corresponding proportion of duty, will be avoided.

(4) Suppose that the whole estate is effectively disposed of (so that section 33 is excluded) but the residuary realty and residuary personalty are not given as one mass: for example, the testator gives pecuniary legacies to A and B, Blackacre to C, the residue of his realty to D and the residue of his personal estate to E. The question will arise whether the realty is available at all for paying the legacies; it would not have been before 1926, and the only provision in the Administration of Estates Act, 1925, which could conceivably make it available is paragraph 2 of Part II of the First Schedule. There is no decision exactly in point, for in *Re Rowe* the gift of " all my real estate " was construed as specific and not residuary. But the considerations which have to be taken into account in arriving at a solution of the problem are virtually the same as in the case of a partial intestacy where section 33 is excluded, and the arguments set out above in relation to paragraph 1 of Part II are equally applicable to paragraph 2. It is submitted that, as in the case of paragraph 1, the restrictive construction is the correct one, and one which it is open to the Court of Appeal, and probably to a judge of the Chancery Division, to adopt. If, however, this view is not accepted, and it is held that the reference in paragraph 2 to the setting aside of a fund indicates that residuary realty given separately is to be available for paying legacies, the question will arise whether it is available only in aid

of the personalty or whether the two are liable *pari passu*. So far as this point is concerned, the reasoning set out under head (3) above will be equally applicable to the present case, and it is therefore submitted that, if paragraph 2 makes the realty available at all in a case of this type, it will be available only in aid of the personalty.

It is to be hoped that the House of Lords may some day have an opportunity of considering the problems discussed above. Meanwhile, in the present state of the authorities the draftsman has a plain duty whenever he draws a will even of the simplest kind, if it contains a pecuniary bequest, to consider the question of incidence of legacies and, if necessary, to insert express provisions which will prevent any of the difficulties discussed above from arising.

THE RIGHT TO INDEMNITY BETWEEN MASTER AND SERVANT

J. A. Jolowicz

The proposition that a master, who has become liable for an injury caused by a servant acting in the course of his employment, can recover an indemnity from the servant is one which has been stated on a number of occasions,[1] but until the recent case of *Romford Ice & Cold Storage Co.* v. *Lister*[2] no clear authority could be cited in support. It is true that the master's rights against his servant have been canvassed in at least three modern cases,[3] but in all of them the common law position has been obscured by the application of the Law Reform (Married Women and Tortfeasors) Act, 1935.[4] In *Romford Ice & Cold Storage Co.* v. *Lister*, however, by what those interested in legal principle can only regard as a happy chance, it was necessary for the Court of Appeal to deal with the matter independently of the Act.

The question arose in this way: the defendant's father, who like the defendant himself was employed by the plaintiffs,[5] was injured in an accident for which the defendant was two-thirds and his father one-third to blame. In an action by the father against the plaintiffs, McNair J. assessed the total damages at £2,400 and accordingly gave judgment for the father for £1,600 and costs. This liability was met by the plaintiffs' insurers, who instituted proceedings against the defendant in the name of the plaintiffs, claiming indemnity or contribution.

Judgment on the father's claim was not delivered until January 29, 1953, but a writ was issued against the defendant on January 23, 1953, six days earlier. The point was therefore taken on behalf of the defendant that the action was premature in that it had been commenced before any liability to his father had been determined. In the light of *George Wimpey* v. *British Overseas*

1 *e.g.*, *per* Warrington L.J. in *Weld-Blundell* v. *Stephens* [1919] 1 K.B. 520, 536; *per* Singleton and Hodson L.JJ. in *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852; *per* Finnemore J. in *Semtex* v. *Gladstone* [1954] 2 All E.R. 206; Salmond, *Torts*, 11th ed., p. 92; Winfield on *Tort*, 6th ed., p. 207; Smith, *Law of Master and Servant*, 8th ed., p. 75.

2 [1955] 3 W.L.R. 631.

3 *Ryan* v. *Fildes* [1938] 3 All E.R. 517; *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852; *Semtex* v. *Gladstone* [1954] 2 All E.R. 206.

4 Hodson L.J. in his dissenting judgment in *Jones* v. *Manchester Corporation* held that the right to indemnity existed at common law, and that there was no room for the operation of the Act.

5 Nothing turns on the relationship of father and son.

Airways Corporation,[6] it was clear that if the plaintiffs' claim depended solely on the Act of 1935 it must fail.[7] Therefore, in order to ensure that the substantive rights of the parties should be determined, a second action was commenced and consolidated with the first, but since liability for costs depended in part upon the outcome in the first action, the position at common law had to be investigated. Moreover, it was not sufficient for the Court of Appeal to hold simply that a right of action existed at common law. A claim in tort would be defeated by the fact that when the action was commenced the plaintiffs had actually suffered no damage, and the vital question was whether there existed a right of action founded upon contract. This question the majority of the Court of Appeal, Denning L.J. dissenting, answered in the affirmative.

In *Romford Ice & Cold Storage Co.* v. *Lister*[8] and in *Jones* v. *Manchester Corporation*[9] Denning L.J. stated, and attached importance to the statement, that there is no reported case in which it has been decided that a master can sue his servant for contribution apart from those cases decided since the Act of 1935. It is perfectly true, so far as I have been able to discover, that there is no reported case before 1935 in which a master has sued his servant for an indemnity,[10] but despite this lack of reported cases it seems that from an early stage in the development of the modern rules governing the liability of a master for his servant,[11] the master's right of action over against his servant has been a part of the common law. That this is so is shown by a line of authority in the law relating to the competence of witnesses which would otherwise be meaningless.[12]

[6] [1955] A.C. 169.

[7] The argument that insurers were suing by right of subrogation to the nominal plaintiffs and were precluded from doing so since they had, when the writ was issued, paid nothing under the policy of insurance, even if open to the defendant, failed because of an express clause in the policy entitling them to sue in the name of the plaintiffs. They therefore had no need to rely on their common law right of subrogation. See *per* Romer L.J. at pp. 652–653.

[8] [1955] 3 W.L.R. 631 at p. 639.

[9] [1952] 2 Q.B. 852 at p. 870.

[10] Except *Colburn* v. *Patmore* (1834) 3 L.J.Ex. 317, where a newspaper proprietor sought an indemnity against the consequences of a prosecution following the insertion of a criminal libel in the newspaper by the editor. The case went off on a pleading point, but it is not surprising that the view was expressed that the action was not maintainable. It may be observed that it seems clear from an intervention in the course of argument that Lord Lyndhurst C.B. thought that an action could be maintained in respect of damages paid on account of a civil libel.

[11] For the history of this development see Wigmore, "Tortious Responsibility" in *Anglo-American Legal History, III*, pp. 520 *et seq.*, Holdsworth, H.E.L., VIII, pp. 472 *et seq.*

[12] Attention was drawn to one of these cases—*Green* v. *New River Co.* (1792) 4 T.R. 589—by the learned editor of the Law Reports in his report of *Jones* v. *Manchester Corporation*, and some of the cases are discussed by the anonymous author of an article in 71 Law Notes p. 193.

By the latter half of the seventeenth century it had become established law that a person interested in the outcome of an action could not give evidence,[13] and from an early date it was held that, in an action against a master for something done by his servant, the servant's interest in the result of the proceedings was sufficient to disqualify him. If, however, he had first been released by his master he was competent to give evidence.

The origin of this rule is probably to be found in the judgment of Holt C.J. in *Martyn* v. *Hendrickson* [14] when he held, in an action on the case against a master for the negligent management of his ship, that the pilot could not give evidence, and in 1738 the qualification was added that if the servant had been released by his master he became competent.[15] Thereafter the rule was regularly applied; if the servant had been released he was competent, but if a release could not be shown he could not be called.[16]

The reason for the rule, that is the nature of the servant's interest, is clear. In *Martyn* v. *Hendrickson* the reason given by Holt C.J. for the pilot's disqualification was that " he was answerable to the master of the ship in an action for the damages he suffered by his ill-management, and consequently for the damages which should be recovered in this action against the defendant, the steering the ship being his province and his management therein the cause of damage to the barge." [17] More than one hundred years later Lord Ellenborough put the same point quite bluntly. In distinguishing this line of authority from the case before him he said that " the case was quite different from an action for the negligence of servants in driving against carriages, or running down ships; for there, if the master be liable to the plaintiff, the servants are necessarily liable to the master. . . ." [18] There is, however, no need to rely upon judicial explanations of the rule. There can be no other explanation but that the servant was liable to his master.

[13] Wigmore, *Evidence*, 3rd ed., II, para. 575, p. 677, Holdsworth, H.E.L., IX, p. 195.

[14] (1704) 1 Salk. 287; 2 Ld.Raym. 1007. The objection that the pilot was not a servant but an independent contractor is not admissible. This distinction was not taken until the nineteenth century. See, *e.g.*, *Bush* v. *Steinman* (1799) 1 Bos. & Pul. 404.

[15] *Jarvis* v. *Hayes* (1738) 2 Str. 1083.

[16] *Green* v. *New River Co.* (1792) 4 T.R. 589; *Miller* v. *Falconer* (1808) 1 Camp. 251; *Morish* v. *Foote* (1818) 2 Moo.C.P. 508. It must be admitted that in one or two cases the rule was apparently not insisted upon; see Viner, Abr., XII, 25, pl. 38; Buller N.P. 77. The rule was abolished by 3 & 4 Will. 4, c. 42, s. 26.

[17] The quotation is from Lord Raymond's report.

[18] In *Cuthbert* v. *Gostling* (1814) 3 Camp. 515. See also the judgment of Parke B. in *Yeomans* v. *Legh* (1837) 2 M. & W. 419, after the Act of Will. 4 had become law.

An interest arising in any other way would not be removed by a release from the master.

It is therefore submitted that it has been a part of the common law since the mid-eighteenth century at the latest, that a master, who has become liable to pay damages for an injury caused by the negligent act of his servant, has a right of action over against the servant.

It is often urged that the so-called rule in *Merryweather* v. *Nixan*,[19] that there can be no contribution or indemnity between joint tortfeasors, is an impediment to the master's action. Master and servant being joint tortfeasors, it is said that there can be no contribution between them otherwise than under the Act of 1935. In the light of authoritative statements that master and servant are joint tortfeasors,[20] and of the general history of vicarious liability, it cannot be denied that master and servant are properly placed under the head of joint tortfeasors. Though one can fully sympathise with Finnemore J. when he said: "For some reason which I have never been quite able to understand, the master who is vicariously responsible for his servant is referred to, and, apparently, treated, as a joint tortfeasor,"[1] the point is now beyond argument. It is contended however that the rule in *Merryweather* v. *Nixan* does not apply, and never has applied, between master and servant where one or other of them is free from culpable fault.

If it is correct that the rule of evidence already discussed proves that the action against the servant has been known to the law since the mid-eighteenth century, the right to an indemnity is older than *Merryweather* v. *Nixan*, but there is another and more cogent reason to support this contention. In *Adamson* v. *Jarvis*[2] Best C.J. pointed out that Lord Kenyon, in *Merryweather* v. *Nixan* itself, had said that his decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right. "From the concluding part of Lord

[19] (1799) 8 T.R. 186.

[20] *e.g.*, *per* Lord Denman C.J. in *Thurman* v. *Wild* (1840) 11 A. & E. 453; *per* Scrutton L.J. in *The Koursk* [1924] P. 140. Various leading writers have expressed the same view: Glanville Williams, *Joint Torts and Contributory Negligence*, p. 1; Winfield, 6th ed., p. 202; Salmond, 11th ed., p. 87. Moreover it is clear that many of the consequences of joint tortfeasorship apply in cases of master and servant: *Thurman* v. *Wild* (1840) 11 A. & E. 453; *Stephens* v. *Elwall* (1815) 4 M. & S. 259; *Swift* v. *Winterbotham* (1873) L.R. 8 Q.B. 244; *Wright* v. *L.G.O.C.* (1877) 2 Q.B.D. 271.

[1] In *Semtex* v. *Gladstone* [1954] 2 All E.R. 206, 208.

[2] (1827) 4 Bing. 66. See also *e.g.*, *Humphrys* v. *Pratt* (1831) 5 Bligh(N.S.) 154; *Betts* v. *Gibbins* (1834) 2 A. & E. 57; *Toplis* v. *Crane* (1839) 5 Bing.N.C. 636; *Collins* v. *Evans* (1844) 5 Q.B. 820; *Dixon* v. *Fawcus* (1861) 30 L.J.Q.B. 137; *Dugdale* v. *Lovering* (1875) L.R. 10 C.P. 196; *Sheffield Corporation* v. *Barclay* [1905] A.C. 392.

Kenyon's judgment in *Merryweather* v. *Nixan*," Best C.J. continued, " and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the persons seeking redress must be presumed to have known that he was doing an unlawful act."

Both Birkett and Romer L.JJ. in *Romford Ice & Cold Storage Co.* v. *Lister* drew attention to this passage and concluded that the effect of *Merryweather* v. *Nixan* had been too widely stated. Birkett L.J., in adverting to the criticism of that case, said [3]: " The severity of the criticism is largely due to the belief that Lord Kenyon was asserting that in no circumstances whatever could there be any contribution between joint tortfeasors, which now appears to have been a misreading of his judgment." Both learned Lords Justice held that, since the plaintiffs in *Romford Ice & Cold Storage Co.* v. *Lister* were wholly innocent of fault, *Merryweather* v. *Nixan* did not defeat their claim. Denning L.J., on the other hand, took the view that *Merryweather* v. *Nixan* is authority for the wide proposition that there can never be contribution between joint tortfeasors. He recognised that there is an exception which permits an innocent person to claim contribution or indemnity, but said that " that exception only applies where the innocent person can rely on a contract for contribution or indemnity, express or implied." [4]

It would appear that this difference of opinion springs from different approaches to the line of cases of which *Adamson* v. *Jarvis* [5] is one well-known example. Do these cases simply represent a special exception to *Merryweather* v. *Nixan*, dependent upon a contractual liability to indemnify, or do they show the limits of that case, namely, that it has no application where one of the joint tortfeasors is innocent of culpable fault?

The view of the majority on this matter, namely, that *Merryweather* v. *Nixan* does not apply where one of the joint tortfeasors is innocent, seems much to be preferred. It is true that in many of the cases, including *Adamson* v. *Jarvis* itself, the plaintiff had acted at the defendant's request, and therefore that an undertaking to indemnify could be implied. It does not, however, seem to be true that the only kind of action which is available to an innocent joint tortfeasor at common law is one founded upon such an undertaking. In *Collins* v. *Evans*,[6] for example, it is clear that the Court of Exchequer Chamber was of the opinion that an action for deceit brought by one joint tortfeasor against the other was not

[3] At p. 649.
[4] At pp. 638–639.
[5] (1827) 4 Bing. 66.
[6] (1844) 5 Q.B. 820. See also *Burrows* v. *Rhodes* [1899] 1 Q.B. 816.

barred by *Merryweather* v. *Nixan*, provided that the elements of that tort could be proved.

Merryweather v. *Nixan* has been subjected to much severe criticism in the past,[7] and there seems no reason for holding that the class of case in which an innocent joint tortfeasor can sue at common law is limited to the specific instance of an action on a contract for indemnity or contribution. As Birkett L.J. pointed out,[8] *Merryweather* v. *Nixan* is no more than an instance of the application of the general rule that "if an act is manifestly unlawful, or the doer of the act knows it to be unlawful, he cannot maintain an action for contribution to or indemnity against his liability arising therefrom." In the case of a master who, without personal fault, becomes liable for his servant's negligence, this general rule is plainly irrelevant. Provided, therefore, that there exists a cause of action on which the master can found his claim, he is not defeated by an argument based on *Merryweather* v. *Nixan*. It remains, therefore, to discover whether there is available to the master a cause of action on which he can found his claim.

There was, it is admitted, no clearly defined rule of the common law laid down in reported cases until *Romford Ice & Cold Storage Co.* v. *Lister*, that an innocent master can recover an indemnity from his servant, but his right to such indemnity, as has been suggested, has been known to the law since the eighteenth century. There seems, in principle, no reason whatever for holding the servant harmless, and in fact the overwhelming body of opinion is in favour of the servant's liability.[9] Reason and justice alike seem to call for the liability. The whole purpose of the master's vicarious liability is to ensure that the innocent third party, injured by the negligence of a servant acting in the course of his employment, can look to a worthwhile defendant. If he chooses to sue the servant direct, the servant cannot, exceptional circumstances apart,[10] recover anything from his master, since he himself was at fault. Why therefore should the servant be held free from liability if the third party prefers to bring his action against the master? In *Semtex* v. *Gladstone* [11] Finnemore J. said: "That an

[7] See especially *per* Lord Herschell L.C. in *Palmer* v. *Wick & Pulteneytown Steamship Co.* [1894] A.C. 318, 324, cited by Birkett L.J. in *Romford Ice & Cold Storage Co.* v. *Lister* at p. 648.

[8] At p. 649.

[9] Apart from the authorities already referred to (note 1, *supra*) and the majority judgments in *Romford Ice & Cold Storage Co.* v. *Lister* one may instance Glanville Williams, *op. cit.*, pp. 162 *et seq.*; the anonymous author of an article entitled "The Careless Chauffeur" in 218 L.J. 29; Singleton and Hodson L.JJ. in *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852; Byrne J. in *Gregory* v. *Ford* [1951] 1 All E.R. 121, 124.

[10] As was the case in *Gregory* v. *Ford* [1951] 1 All E.R. 121.

[11] [1954] 2 All E.R. 206, 212.

employee who is negligent and causes grave damage to his employers should be heard successfully to say that he should not make any contribution to the resulting damage is a proposition which does not, in the least, commend itself to me, and I do not see why it should be so. Justice, as we conceive justice in these courts, requires that the person who caused the damage is the person who must in law be called on to pay damages arising therefrom." With these observations Romer L.J., in *Romford Ice & Cold Storage Co.* v. *Lister*, expressed his agreement.

What then is the basis of the master's cause of action against the servant? Romer L.J.[12] suggested in passing that in most, if not all cases, the master can sue his servant for negligence, but the basis of the decision of both Birkett and Romer L.JJ. in *Romford Ice & Cold Storage Co.* v. *Lister* was that the master's action is for breach of an implied term in the contract of service. This was also the view of Finnemore J. in *Semtex* v. *Gladstone*, and the suggestion that an action may lie in negligence is no more than an alternative. In the particular circumstances of *Romford Ice & Cold Storage Co.* v. *Lister*, the action in negligence would not have availed the plaintiffs since the action was commenced before damage had accrued. Only upon the basis of contract could they succeed. *Romford Ice & Cold Storage Co.* v. *Lister* is therefore clear authority for the proposition that the master has an action founded upon contract, but apart from the fact that it is now established that the action lies in contract, the reasoning in the majority judgments, if it may be said with respect, has much to recommend it. Not only is there old and well-established authority for the existence of an implied term in a contract of service that the servant will exercise reasonable care and skill in the performance of his duties,[13] but the implication of such a term is no more than common sense requires. If a workman were asked, on entering upon a contract of service, whether he undertook to exercise reasonable care, he would surely answer "Of course." Denning L.J., in *Romford Ice & Cold Storage Co.* v. *Lister*, while apparently admitting this, urges that the servant does not give a warranty that he will never make a mistake, and that there is no intention to create legal relations. Yet the negligence of the servant is undoubtedly a tort, and it does not seem unreasonable to hold that the servant undertakes, as part of his contractual obligations, to commit no torts which will involve his master in liability.

As Denning L.J. himself points out, it is not suggested that the

[12] At p. 654.
[13] *Harmer* v. *Cornelius* (1858) 5 C.B.(N.S.) 236. See also *Digby* v. *General Accident Fire and Life Assurance Corporation* [1943] A.C. 121.

implied term on which the servant's liability rests is that he undertakes to indemnify his master against the consequences of his negligence. Such a term cannot sensibly be implied into a contract of service, and there is no need for it. The implied term is that the servant undertakes to exercise reasonable care in the performance of his work, and a contract of service which did not contain such a term would be almost unthinkable. If a servant were asked to give an undertaking in these terms and refused, no master would employ him. The servant is clearly under a contractual obligation to exercise reasonable care in his work, and for a breach of this duty the master has an action. Moreover, this action lies whether the loss suffered by the master arises out of damage to his property or person, as was the case in *Digby* v. *General Accident Fire and Life Assurance Corporation*,[14] or out of a legal liability to pay damages to a third party. In both cases the application of the ordinary law of damages leads to the result that the master is entitled to recover what he has lost. In the former case he can recover damages for the injury inflicted, and in the latter he can recover the sum he has had to pay to the third party together with any costs reasonably incurred. From the conclusion that the action lies in contract it follows that the master may have a right of action even though he has suffered no damage, but this need cause no difficulty. The discretion of the court in matters of costs provides a sufficient deterrent—if one be needed—to prevent masters from bringing actions when they have incurred no damage.[15]

Denning L.J. denies that the action lies in contract, and reinforces his argument by analogy. The converse case, he says,[16] where the servant is injured by the negligence of the master is a case of tort only, not contract. "If there is no implied promise of care by master to servant, so also is there none by servant to master." This, with respect, cannot be accepted. Denning L.J. says that in *Wilsons & Clyde Coal Co.* v. *English*[17]—which is probably the most important modern case in the law governing the duties owed by a master to his servant—there is no word to suggest that the employer's liability rests upon an implied contract. Yet

[14] [1943] A.C. 121.

[15] Since it is now clear that if a husband injures his wife in the course of his employment she may recover against her husband's master (*Broom* v. *Morgan* [1953] 1 Q.B. 597) it seems to follow from the decision in *Romford Ice & Cold Storage Co.* v. *Lister* that the master can recover over against the husband. It may be doubted however whether the court would be prepared to allow, by this round-about process, what would amount to an action by a wife against her husband. But see Denning L.J. [1953] 2 Q.B. 517–518.

[16] At p. 637.

[17] [1938] A.C. 57.

it seems clear that in that case Lord Wright regarded as correct the well-known passage in *Smith* v. *Baker* [18] when Lord Herschell said: "It is quite clear that the *contract* between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." There is no need to pile up authorities on this matter, but by a curious chance another Division of the Court of Appeal, less than two weeks before the hearing in *Romford Ice & Cold Storage Co.* v. *Lister*, expressly held that the employer's duty of care is a contractual duty.[19] Apart from the rare case of a temporary service which fulfils the stringent test laid down by the House of Lords in *Mersey Docks & Harbour Board* v. *Coggins & Griffiths*,[20] the duty only arises where the contractual relationship of master and servant exists. Is it not perhaps permissible to turn Denning L.J.'s argument round and say: "Since there is an implied promise of care by master to servant, therefore there is one by servant to master?"

In *Jones* v. *Manchester Corporation* [1] it was held by the majority of the Court of Appeal [2] that the hospital board, as well as the doctor from whom the board was seeking indemnity or contribution, was to blame for the original injury, and therefore that no indemnity could be granted. In fact Singleton and Denning L.JJ. held that the board was 80 per cent. to blame. In these circumstances, where both parties are not only jointly liable to the third party in law, but are both guilty of culpable fault, it is clear that neither has any rights at common law against the other, and the Court of Appeal accordingly apportioned the damages as provided by the Act. It is laid down in the Act, however, that no person can rely on its provisions to recover contribution from a person who is entitled to be indemnified by him,[3] and therefore it is only where both master and servant are guilty of culpable fault that the Act can affect the position. It is true that a person entitled to an indemnity at common law can also rely on the Act,[4] but he cannot thereby recover more than a full indemnity.

As between master and servant, therefore, the position seems

[18] [1891] A.C. 325, 362.
[19] *O'Reilly* v. *I. C. I.* [1955] 1 W.L.R. 1155: see especially *per* Jenkins L.J. at p. 1163.
[20] [1947] A.C. 1.
[1] [1952] 2 Q.B. 852.
[2] Hodson L.J. dissenting.
[3] s. 6 (1) (*c*) proviso.
[4] Contribution amounting to one hundred per cent. was awarded in *Ryan* v. *Fildes* [1938] 3 All E.R. 517; in *Semtex* v. *Gladstone* [1954] 2 All E.R. 206 and in the second action in *Romford Ice & Cold Storage Co.* v. *Lister* [1955] 3 W.L.R. 631.

reasonably clear. Where the servant has acted at his master's request, and thereby becomes liable to a third party, but without culpable fault on his part, he is entitled to an indemnity at common law. Where the position is reversed, and the master, without culpable fault, becomes liable for some act of his servant done in the course of employment, he can recover indemnity from the servant. Where both master and servant are guilty of culpable fault, neither has any rights against the other at common law, and the court must apportion the damage in accordance with the Act.

It is to be observed that in *Romford Ice & Cold Storage Co.* v. *Lister* the defendant's father was partly responsible for the accident in which he was injured. Since he was, at the time, plainly acting within the course of his employment, it may be argued that his negligence should have been imputed to the plaintiffs—his employers—and accordingly that the result should have followed *Jones* v. *Manchester Corporation*. Both the defendant and the plaintiffs—by the imputation to them of the father's negligence—were to blame for the accident, and therefore, on the principles outlined above, the plaintiffs had no right to indemnity at common law. The Court of Appeal, however, evidently regarded the fact that the defendant's father was guilty of contributory negligence as irrelevant, and in the respectful opinion of the writer this is correct. It is no defence for the servant from whom an indemnity is sought that the person whom he injured was in the same employment and, by his lack of care for his own safety contributed to the accident. The plaintiffs claimed no more than they had actually paid to the defendant's father, and this was a sum which had already been reduced from £2,400 to £1,600 by reason of the father's contributory negligence.[5]

If the conclusion that the servant is liable to indemnify his master against the consequences of acts of negligence committed in the course of employment is correct, it tends to show that it is desirable that servants as well as their masters should be insured against liability to third parties. So far as accidents arising out of the use of motor-vehicles on the highway are concerned, the master is obliged to provide cover, at least to the extent laid down in the Road Traffic Act, 1930,[6] but there is no similar rule in respect of other classes of accident. In the existing state of the law the only safe way of effecting suitable cover seems to be for the servant to enter into contractual relationship with the insurers. Unless

[5] I am indebted to Professor Hamson for drawing my attention to this point. It is only fair to add that I have reason to believe that he does not agree with my conclusions as to its validity.

[6] *Gregory* v. *Ford* [1951] 1 All E.R. 121.

reliance is placed upon the doctrine of trust, or fresh legislation is introduced, it seems impossible for the master to effect the insurance on his servant's behalf, and the doctrine of trust is notoriously unreliable in this context.[7]

It would seem that no real difficulty should arise. The master, acting as agent for the insurers, could arrange matters with each servant when he was taken on, or the insurance could be effected through the appropriate trade union. For the avoidance of litigation between insurers it would obviously be desirable for the servant's policy to be with the same insurers as the master's, and if this were done the premium could presumably be very small indeed. In effect, all that the insurers would need to charge for would be the loss of their right to recover an indemnity from the servant, a right seldom exercised and often worthless.

An alternative method of providing the cover would be to introduce legislation similar to that contained in the Road Traffic Act, 1930,[8] and thereby enable, or require, masters to take out a policy covering their servants, and giving the servants the benefit of the policy. This method, however, apart from the difficulty involved in obtaining the necessary legislation, would do much to destroy the wholesome effects of *Romford Ice & Cold Storage Co.* v. *Lister* by again concealing the fact that a servant, as much as anyone else, is liable for the damage he causes by his negligent conduct. For the servant to insure himself—guided and assisted by his master or his union—is unexceptionable. For his master to do it on his behalf is to encourage the fallacy that servants are free from responsibility for their torts, a fallacy which *Romford Ice & Cold Storage Co.* v. *Lister* should do much to destroy.

[7] See *e.g.*, *Vandepitte* v. *Preferred Accident Assurance Corporation of New York* [1933] A.C. 70.
[8] s. 36 (4). See *Tattersall* v. *Drysdale* [1935] 2 K.B. 174.

BOOK REVIEWS

International Law. By L. Oppenheim. Eighth Edition by H. Lauterpacht, Q.C., LL.D., F.B.A. Vol. I—Peace. [London: Longmans, Green & Co. 1955. lvi and 1029 and (index) 42 pp. £4 10s. net.]

Just half a century separates the eighth and the first editions of Oppenheim's volume on the law of peace. That fifty years has probably seen greater changes in the substance, and techniques, as indeed in the status, of international law, than any comparable period in the entire history of the subject. So that, even granted the English proclivity for editing and then re-editing law text-books, it is none the less astonishing that Oppenheim should have survived this period of momentous changes in its subject-matter and that its influence should have waxed rather than have waned. Of course the survival has only been made possible by radical and sometimes ruthless changes in the character of the book. Had the work of editing got into the hands of cautious pedants who, out of respect for the original, had piously confined themselves to rendering the original unreadable, Oppenheim had been dead long ago. But the book has been fortunate in its editors, who have never been shy of allowing it to grow with its subject. Of course this means that after a span of half a century there is not a great deal of the original left. The present editor estimates that there is less than a third of the present volume written by Oppenheim, and even that is much altered. There are those who affect to regret the loss of the simplicity and clarity of the original, but this is to ignore the development and elaboration of the law which happily has taken place since Oppenheim wrote. To consider only one of many pointers to this development: the first edition cited but fifty-four cases, and many of those were diplomatic incidents rather than cases in the proper sense of the word; this new edition cites something over eight hundred cases. Moreover, it must be remembered that the late Professor Oppenheim was addressing himself to a very different kind of reader. In his preface he laments that in his experience those who were interested in international law "are not jurists and have no legal training" so that "certain truisms must be repeated again and again, and much that is obvious to the trained jurist must, to insure comprehension, be pointed out at some length." The present-day writer on international law may certainly permit himself a crisper approach.

It is some twenty years now that Oppenheim has been in the hands of Judge Lauterpacht. During that time he has put into

the book scholarship, imagination and labour which few could have equalled. Lauterpacht's Oppenheim is now an indispensable tool for student, teacher and practitioner alike, and this latest edition is no less distinguished than its predecessors. The preface calls attention to two major changes. First, a large number of references to old and often obsolete books or articles have been culled. This can only have been a most arduous task, but it is justified by the result; and it is worth recalling that Oppenheim himself attached particular importance to the bibliographical references. Secondly, the obsolete appendix of tables of certain kinds of treaty has given place to a new 72-page appendix with a systematic description in some detail of "specialised agencies of international co-operation and administration." Though this is a most welcome and useful innovation, yet the need to deal with this important new law in an appendix is perhaps a symptom that the law is beginning to outgrow even the plan of Oppenheim's original work. The best solution now would be the publication of the learned editor's own treatise, but that is hardly possible yet awhile, and in the meantime all international lawyers will be grateful for another of his editions of Oppenheim.

R. Y. Jennings.

A Common Lawyer Looks at the Civil Law. By F. H. Lawson. [Ann Arbor: 1953 (? 1955). University of Michigan Law School. xxii and 216 and (index) 22 pp. 32s. net.]

This book consists of the five lectures delivered as the fifth series of the Thomas M. Cooley lectures at Michigan in 1953. The author with great reticence describes them as "the modest fruit of prolonged reflection on the Civil law." With less reticence Professor Yntema says, in the foreword accompanying them, that "their distinguished author, the first Professor of Comparative Law at Oxford University, not only speaks with authority on Roman and English law but also is widely conversant with the various systems of modern civil law. To these unusual qualifications are added, as these lectures attest, incisive appreciation of what is comparatively significant and the grace to express technical detail in illuminating general terms. What he has to say in these lectures is a doubly valuable contribution as a felicitous model of a concise, readable, and comprehensive type of text, much needed in American legal education to enlighten the study of cases, which at the same time now makes available to the ordinary law student a magistral account, as envisaged by a common lawyer, of the central element of Western legal culture—the civil law."

The title, and the form of words sometimes adopted by the author, may suggest that a contrast is intended between the common

law as a system and a system such as that prevalent, for example, in France today. In fact, the subject-matter of the study is a *part* only of the *private* law in each of such systems—namely those topics principally which will be found in the French Code Civil. While it may be desirable and even necessary so to limit the subject-matter of a series of lectures, it is probably this limitation which explains the proposition offered by the author that the right approach to a comparative study is by way of Roman law, for a return to which an earnest plea is made at the close of the lectures. But even among the *civilistes* in France there would be few who would agree in advocating such an approach to their own system. The author, however, is "long accustomed to teach Roman law," and indeed it is his comments on the classical Roman law in the third lecture which the reader will probably find the most valuable part of the book—his analysis of consensual contracts is striking—though the first lecture, on the Historical Background, also has great merit as an informative and well-arranged narrative. Conversely, the same limitation results in the second lecture—on the form and sources of the civil law—being the least satisfactory. The last lecture—on the non-Roman elements in the civil law—is most interesting, especially for the discussion it contains of matrimonial régimes: it seemed to this reviewer greatly superior to the fourth lecture—on the advance beyond Roman law.

A summary account can give no idea of the wealth of incidental comment made by the author. It is the range of his allusion and reference which is stimulating—it would be impossible for a student reading the lectures to fail to acquire at least the desire for a new approach to the subject-matter of his technical studies. This power of stimulation is much enhanced by the clarity of the author's style. The resulting freshness is particularly valuable as the author's approach necessarily leads him to re-examine topics which have not lacked examination in the past.

C. J. Hamson.

The Proof of Guilt. By Glanville Williams, ll.d., Fellow of Jesus College, Cambridge; of the Middle Temple, Barrister-at-Law. (Published under the auspices of the Hamlyn Trust.) [London: Stevens & Sons, Ltd. 1955. viii and 294 pp. 17s. 6d. net.]

Dr. Glanville Williams' study of the English criminal trial, delivered in four Hamlyn Lectures at Birmingham in October, 1955, appears in print at a moment when general interest in the administration of criminal justice is peculiarly high. In the last year, the public have been confronted with a series of unusual incidents and

confounded by a spate of comment on them, ranging from hysterical alarm to stubborn composure. The reasonable man has been bedevilled by a knife fight in Soho which occasioned a prosecution but produced no conviction, by its sequel, a trial for conspiracy with a self-confessed perjurer as the Crown's leading witness, by an unsuccessful prosecution for perjury in which the jury rejected the police evidence, by another conspiracy charge involving, unhappily, a solicitor and a detective-sergeant, by the release of three men from prison with what sounded like a "free pardon" for a crime they had not committed, by rumblings that all was not well in certain sections of the police force, and by a resurgence of the capital punishment controversy. There could hardly be a more opportune time for subjecting to a close scrutiny the rules of procedure and evidence in the English form of criminal trial. And, of course, there can hardly be a more ruthless examiner of things established and unquestioned than Dr. Glanville Williams. So let it be said at once that the most comforting feature of a disturbing year is the healthy condition in which the English trial system emerges from his clinical examination.

The author first examines the difference between the English and Continental system of appointing judges. He finds, without too much enthusiasm, in favour of the English system: "it has produced judges of intelligence, alertness, patience, toleration, and firmness, at least equal to any that could be obtained by civil service methods of selection and promotion." He is less happy about recorders and chairmen of quarter sessions and would like to see a redesigned system of regional criminal courts. But in the trial itself, "the reticent attitude maintained by the judge during the adduction of evidence, emerges with full marks." The English accusatorial system, in relation to the mode in which evidence is elicited, with relative inactivity on the part of the judge, is preferred to the French method. So far, so good.

Next, the accused's right to avoid all questioning by electing not to go into the witness-box is examined. Bentham is prayed in aid, so is Stephen. Bentham had called the rule "one of the most pernicious and most irrational notions that ever found its way into the human mind." Dr. Glanville Williams prefers the Continental practice, and would allow questions to be addressed to the accused by counsel for the prosecution, though with no compulsion on the accused to answer them: the inference to be drawn from his silence under questioning being preferred to that now drawn from his "failure to volunteer for questioning." Failing this, he would allow prosecuting counsel to comment on an accused's refusal to give evidence, a right which at present is held only by the judge. The question and answer method of eliciting evidence in chief, and the system of cross-examination, are approved, but the perfunctory way in which the oath is used, and the difficulties inherent in a

prosecution for perjury, are criticised. The artificial rules of compellability and competence of spouses as witnesses might well go, he thinks, and a spouse be put on the same footing as any other witness, except for privilege from disclosing marital communications.

Over a hundred pages of the book are given to a searching examination of rules of evidence and of the value of certain types of evidence. There is an interesting account of experiments by Sir Cyril Burt and Professor Gower to test " the accuracy of recall " by witnesses, and by Professor Bartlett to test ability to identify. The stories of Adolf Beck and Oscar Slater are retold, and the controversial case of Rowland in 1946, and the Home Office inquiry into it, are raised again. It cannot be denied that they make disturbing reading. The difficulties of conflicting expert evidence are demonstrated, and the current practice in relation to handwriting evidence is criticised. On the other hand, full approval is given to the rules for corroboration of accomplices (though the definition of accomplice in the *Davies* case comes under fire) and of witnesses in sexual cases. Dr. Glanville Williams would add similar rules of corroboration for identification evidence, evidence in charges of writing anonymous letters, and " all evidence that experience shows is likely to be warped by sexual motives." The last category might well turn out to be unlimited. The 1925 Committee's recommendation for a relaxation of the requirement of corroboration of the unsworn evidence of young children, all testifying to different incidents of sexual misbehaviour by one offender, is supported by Dr. Glanville Williams and will meet with the approval of many. A plea is made for a clearer recognition of the difference between the evidential burden and the persuasive burden of proof in criminal cases, and the proper direction to the jury on the quantum of proof is examined. The French discretionary power to exclude hearsay evidence is preferred to the stricter English rules, but " the English rules excluding prejudicial evidence of bad character and similar criminal acts survived critical inquiry, notwithstanding the difficulties occasioned in their application."

Having dealt with the modes of proof and the rules of evidence, Dr. Glanville Williams then turns, for some eighty pages, to the jury. All arguments for and against the jury system are analysed. Blackstone, Brougham, Stephen, Lord Halsbury, Lord Hewart, Lord Goddard, Lord du Parcq, Lord Justice Bankes, Mr. Justice Humphreys, Mr. Justice Croom-Johnson, Lord Justice Denning, Mr. Claud Mullins and even Mr. Raymond Postgate give their views. Sir Hartley Shawcross is quoted: " It is better to risk a bad jury making a mistake in a single case than to have a bad judge able, if not checked by a jury, to make mistakes throughout his judicial career." But, in the end, Dr. Glanville Williams is of opinion that " trial by three judges, giving reasons for their decision and subject to correction on appeal, should in all human experience be a better trial than by jury; if it is not, there must be something

gravely wrong in our method of appointing judges." As an alternative he would accept two lay magistrates, or in the gravest cases four or six, sitting as assessors with the professional judge. It would be interesting to see how this worked, but the reviewer is confident that he will not live to see it tried. Other points that are considered are the influence of the summing-up, the inscrutability of the verdict of a jury, the requirement of unanimity, the absence of a power to order a new trial, and the absence of appeal by rehearing. The book concludes with a brief discussion of magistrates' courts.

There are, of course, occasions when Dr. Glanville Williams is provocative to readers with little predilection for change or for importations from abroad. " The obvious way to reduce the law to simple and intelligible form would be to codify it, but this has always been resisted by the majority of judges " (p. 232) reminded the reviewer that at the age of eighty-two Bentham referred to himself as " codifying like any dragon," and conjured up a picture of the author, whose national flag displays a dragon, codifying like any Bentham in forty years' time. The reference to flogging in prisons since the Criminal Justice Act, 1948, as a " form of torture " is irritating (p. 29). To say that " Bentley was hanged because, on the evidence, he said to Craig: ' Let him have it, Chris ! ', when Craig thereupon shot a policeman," is to ignore other aspects of the case (p. 79). But to this contribution to the Hamlyn Series of Lectures high praise must be given. Dr. Glanville Williams has said much that needed to be said. He has said it with the clarity and incisiveness for which he is well known. The conception and execution of the lectures are excellent. There are a number of delightful stories. If a stimulus is something that rouses one to activity or energy, then this book is indeed stimulating: it even drove the reviewer, struggling against his own " insular bigotry," to take a walk while he turned over in his mind the possible advantages of the German *Schöffen* system over English juries and lay and stipendiary magistrates. Whether one is a Benthamite or a staunch supporter of Miss Mitford's Uncle Matthew, this book is irresistible. There is not a dull passage in it.

F. J. Odgers.

Mens Rea in Statutory Offences. By L. Ll. J. Edwards, M.A., LL.B., PH.D., of the Middle Temple, Barrister-at-Law, Reader in the Queen's University of Belfast. [London: Messrs. Macmillan & Co., Ltd. 1955. xiv and 258 and (index) 31 pp. 21s. net.]

Dr. Edwards had two objects in writing this monograph which is published as the eighth volume in the Cambridge series of *English Studies in Criminal Science*. The first, as stated in the Editorial Note, was to present " a comprehensive and critical examination

of the judicial interpretation of the language which is used in the definition of statutory offences," to demonstrate "the inconsistencies which have inevitably arisen in the interpretation of existing enactments," and so to provide "an indication of some of the difficulties to be avoided by the draftsmen of future legislation." The second object, in the words of the Author's preface, was to "direct attention to the serious danger of the criminal law falling into disrepute if both the legislature and the courts allow statutory offences to be administered with scant regard for the doctrine of *mens rea*."

Exposition and expostulation are not necessarily incompatible purposes. But the combination of these twin roles calls for a masterful technique if expostulation is not to scorch exposition and if exposition is not to dampen expostulation. If there is a complaint against Dr. Edwards' otherwise very impressive achievement, it is that he has not quite succeeded in discharging his twin objects with that technique of continuous balance which would evoke the unbroken assent of his readers.

Nothing in this review must derogate from the sincere tribute which Dr. Edwards merits for the successful discharge of his first object. He has been prodigiously industrious in collecting the relevant statutory and case-law material. The first eight chapters on the subject of the judicial interpretation of the statutory terms "Malicious," "Wilfully," "Knowingly," "Permitting," "Suffering," "Causing," "Allowing" and "Fraudulently" are very valuable and comprehensive repositories of material. Although the reader is not at all times quite certain that Dr. Edwards is keeping to his own basic yard-stick, the analysis in these eight chapters reaches a high standard. On wider planes, the end three chapters on "The Criminal Degrees of Knowledge," "Vicarious Liability in Statutory Offences" and "General Outlines of Mens Rea in Statutory Offences and Concluding Remarks" are similarly valuable reviews of their subjects. There are, no doubt, points in the exposition on which opinions may well differ, but taking it as a whole the work exhibits painstaking scholarship. It is very free of those blemishes of carelessness which mark the slipshod mind. (There are few minor slips, like the Scandinavian (Hansen J.) on the English bench at p. 47; and it would be useful if writers could agree on the surname of the gentleman in the unreported bigamy case of "Weiwow," or "Weiow" (as here five times) or "Weirvow" (as in the Archbold index).

Where there is so much to praise, it may be churlish to sound a note of criticism, but any honest reviewer is bound to say that Dr. Edwards has played less fair with his readers than do the majority even of detective story writers. For about four-fifths of the work, the reader finds himself frequently saying: "But surely——?"; in the last fifth he discovers that the very arguments, considerations and qualifications which earlier occurred to

him were also in the mind of Dr. Edwards, only that he chose not to state them until the end of the book! Making every allowance for intractable material, once he had proclaimed at the outset his proposed defence of the *mens rea* doctrine, surely his very first duty was to define his doctrine so as to enable his readers to estimate the validity of his powerful criticisms of the judicial polluters of the pure milk of the gospel. Furthermore, the *mens rea* doctrine is not an end in itself; the doctrine and its invasions must be judged in the light of the legitimate and varying ends of the penal law. It is only seven pages from the end of the work that Dr. Edwards says that "a closer analysis of this concept (of *mens rea*) is now called for" and asks "What does it connote?" With respect, that is just the question his readers have been asking during their perusal of the previous 250 pages! On the matter of the varying ends of penal policy—surely a most vital matter in judging the judges—it is only on p. 218 (and that in a footnote) that Dr. Edwards *really* begins to admit that they may justify some divergent approaches to questions of liability. The total result is that the concluding and summing-up sections are something of an anti-climax to the earlier expostulations. Things, including judges, are not so bad after all!

A general comment, not prompted by Dr. Edwards' work, may perhaps be appropriate at the end of this review. The recent increased attention to analytical problems in the criminal law is most welcome and can do nothing but good. At the same time, it must always be remembered that the judicial interpreters of social legislation have not lived in the past, any more than they do today, on some high plane where the sole or supreme desiderata are universal consistencies of analysis and uniform applications of standardised doctrines. Not all penal provisions have the same social pressures behind them. The recognition in the law of torts of varying interests justifying different degrees of protection must have its counterpart in the criminal law. The *ultimate* test of a decision is whether it was right on a balance of *all* relevant considerations, not whether the terms of the judgment which supported it were completely felicitous—however desirable it is that they should be so. Furthermore, it must be recognised that the balance between society and the individual is not a static affair from period to period, or indeed within the one period in respect of all issues. Modern reviewers of judicial interpretations of fifty or more years ago may not really be able to appreciate the full extent of the social considerations which prompted them. For example, the unutterable squalor, degradation and misery which prompted some of the provisions of the licensing laws are not irrelevant in judging the judicial interpretations of them. For this reason, one should be particularly careful about classifying some judges on the side of the angels and relegating others to analytical nether regions. Lord Hewart, for example, tended to be an "absolutist" in

matters of statutory interpretation, but one wonders how the industrial protection provisions would have fared but for his resolute determination to maintain their strictness.

D. R. Seaborne Davies.

Three Great Systems of Jurisprudence. By K. Kahana Kagan, M.Litt. (Cantab), Lecturer in Codes, Jews' College, London, with a Foreword by Harold Greville Hanbury. [London: Stevens & Sons, Ltd. 1955. xii and 192 and (index) 7 pp. 25s. net.]

The dust cover of this book tells us that the author is "saturated with the works of Maitland," and that this volume shows him to have "cogitated much on English law." From the Vinerian Professor's foreword we further learn that the author, "trained in the Jewish system, . . . has added to it, by close study, the Roman and the English in the storehouse of his mind." The result of this saturation and cogitation, this training and addition, combined with the active use of several pairs of scissors and a good many pots of paste, is not easy to review.

What is the author trying to do? In the preface he tells us that "in seeking the ideal system of law the major question has always been how to combine clarity and certainty with adaptability to the needs of the members of a changing social body," and that he has "drawn attention to a new line of investigation by which the problem of combining certainty with the capacity for growth and development can be found." After chapters on the Value of Comparative Law, Jewish Law and Roman and English Law, Jewish Law and Roman Law, Jewish Law and English Law, and the Process of Legal Development we read the Conclusion, whence it would appear that this new line of investigation (which does not clearly emerge to your reviewer) clearly points to the study of Jewish law, and especially to its techniques for securing "equity" in the individual case, without resorting to separate jurisdictions, like those of the Praetor and Chancellor in the Roman and English systems. Thus there can be no doubt that the author succeeds in his aim of providing workers and students with "a pointer to a source where they may hope to find constructive material which will help them to formulate the new conceptions which are needed in equity." Further, Mr. Kagan communicates his moral fervour, and carries conviction in his thesis that Jewish law embodies a higher ethic than the civil or the common law. But to at least one reader he fails to communicate any clear, definite, general ideas.

It may be that Mr. Kagan is trying to say that Jewish law is obeyed because of the respect of the Jewish people for the values

of individual liberty, dignity, equality, free speech, charity, education, the public good, and other values protected by Jewish law; because of the wisdom, learning and integrity of its exponents; because of the way that the whole community participates in the making of new rules; and because of the techniques for avoiding technicalities in adjudications and allowing the " merits " of individual cases to be decisive. But he says it in jargon which must make Maitland turn in his grave. To write Jurisprudence it is not enough to know the rules of three legal systems and to adhere with fairness to liberal ideas. It requires a clear theoretical framework which today is sadly lacking—and which Mr. Kagan most definitely does not supply.

B. E. King.

The Judicial Control of Public Authorities in England and Italy. A Comparative Study. By Serio Galeotti, d.ph., dr.jur. (Milan), with a Foreword by Professor F. H. Lawson. [London: Stevens & Sons, Ltd. 1954. xi and 253 pp. 30s. net.]

Among the increasing number of books bearing the subtitle " A Comparative Study," Dr. Galeotti's courageous venture deserves an especially warm welcome. The subject is, of course, outstandingly suitable for comparative treatment, for the chief problems of administrative law are the common lot of all countries which value the traditional liberties. But it is not only on this that the British Council are to be congratulated for enabling Dr. Galeotti to study for two years at Oxford: for it is evident that an author has been found who is fully equal to his difficult subject, and who has produced a most valuable work for English readers.

Under Dr. Galeotti's skilful arrangement his two subjects (the English and the Italian rules) are treated *pari passu*, so that they intertwine without becoming entangled. He does not succumb to the temptation to follow any one topic too far—a temptation which must often have beset him in trying to extract some coherent principle from a mass of English cases. Thus the reader can always see both systems side by side, and the comparison is made to full advantage. It must be added that Dr. Galeotti is a discerning and dispassionate critic. All through the book he is weighing the two systems in the scales against each other, and he never shrinks from passing judgment. But, although in general he yields the palm to his own country, few English lawyers will disagree with his very temperate and sensible criticisms of the English system—if system it must be called. It is one of the merits of the parallel treatment that it constantly throws a fresh light on the English law while also giving a most interesting account of the

Italian. The guarantee given by Professor Lawson in his foreword, that Dr. Galeotti really knows his English law, is fully honoured.

The Italian machinery of judicial control is markedly similar to the French. There is the same division of jurisdiction, so that administrative cases go to a special hierarchy of courts which culminate in the *Consiglio di Stato*. But there are two qualifications. First, where an administrative act infringes a private right (*diritto*), as opposed to a mere interest (*interesse*), the ordinary courts have jurisdiction; and secondly, it is the ordinary courts which ultimately decide jurisdictional disputes—there is no *Tribunal des Conflits*. The first exception is evidently a narrow one, so that virtually all cases of excess or abuse of power appear to belong to the *Consiglio di Stato*. Now that body, like the *Conseil d'Etat*, is primarily composed of civil servants, a certain proportion of whom must have legal training; and it is by no means solely an administrative court, for three of its six sections are consultative. Its judicial sections form a sort of modern Star Chamber, in the sense that they are a judicial wing of the administrative body. By developing such organs of self-discipline *within* the executive itself, in defiance (according to English notions) of the separation of powers, Italy and France have avoided the dilemma which now frustrates the development of administrative law in England: that there is great need for judicial control, yet it is wrong for the courts to be concerned with "policy." Thus the English law is driven into excessive technicality and an unhealthy preoccupation with procedure. The merit of the Franco-Italian system is that the gulf between "law" and "policy," though of course it exists, does not represent a *jurisdictional* barrier, and so the administrative court can be more "penetrating" (Dr. Galeotti's apt word) in its control.

Dr. Galeotti does not himself say much about this fundamental difference in interpretation of the doctrine of separation of powers. But he makes the interesting point that it was English principles, imported via the Belgian constitution of 1815, which in 1865 at first led the new kingdom of Italy to abolish administrative courts. But this left such an obvious gap that in 1889 the *Consiglio di Stato* was reconstituted with administrative jurisdiction. In the year when Dicey was publishing the third edition of his work Italy was thus abandoning the type of constitution which he praised, having tried it and found it wanting. The comparison cannot of course be pressed, more particularly since at that time the courts in England were still able to cope comfortably with the subject-matter which Parliament thrust upon them, and were, in this field, at the top of their form. But the time was at hand when new conceptions of government would demand new constitutional machinery, which the courts could hardly be expected to improvise. The forward-looking Continental approach was to analyse. and

construct. The backward-looking English approach was to deny the need for new principles, and to hope that piecemeal legislation, fortuitous case-law, and medieval writs, would, in some mystical Blackstonian manner, result in an ideal constitution. It was Italy and France which took thought for the morrow.

But there is another side to the picture when it comes down to detail, for the English system has the merits of its defects. As Dr. Galeotti emphasises in many places, Italian law is more complete and logical in its scope, but English law, so far as it goes, provides superior remedies. For example, the *Consiglio di Stato* has in its armoury no preventive weapons like injunctions, declarations or orders of prohibition; no costs are awarded against Government Departments; and there is nothing like the English public inquiry which, unsatisfactory though it is, is at least an attempt to do fairly by all concerned. An Italian citizen has little opportunity to raise his voice before a decision is taken; but he has greater opportunities for complaining about it afterwards. The result is that great numbers of cases accumulate in the administrative courts, and there is a delay of at least two years. This is less serious than in the French system, but the heavy backlog in both countries seems to be an inherent defect.

A great many illuminating points of detail will be found in Dr. Galeotti's pages. Of especial interest, in view of the defective state of English law, is the Italian solution to the vexed question of State secrets. The Code of Civil Procedure lays down that with certain exceptions (primarily diplomatic, military or professional secrets and confidences) the judge may draw inferences from the refusal of a person to disclose any relevant evidence. This rule is evidently applied against the State in just the same way as against private parties, and the *Consiglio di Stato* may decide to treat the plaintiff's case as proved if it does not approve the non-disclosure —much as was done by the *Conseil d'Etat* in the affair of the *Ecole Nationale* in France. This practice of course runs counter to English ideas of evidence; and it is not much use in cases like *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 624, where the government is not a party and the punishment will not therefore fit the crime. In a case such as *Ellis* v. *Home Office* [1953] 2 Q.B. 135 it offers tempting possibilities; but even there English judges, with their highly developed sense of evidence, would surely dislike it almost as much as would Government Departments.

There are a number of places where an English reader would welcome more Italian examples than Dr. Galeotti gives him, in order to remove the occasional feeling that like is not being compared with like. The text is fully furnished with English examples, and in general they are admirably handled. The passage on "jurisdictional fact," in particular, is more helpful than even English textbooks are prone to be, though perhaps that is not saying much. It is a pity that the passage on natural justice is not

quite so convincing, but that would be a great deal to expect. Every reader of this book will finish it with a keen admiration for the way in which Dr. Galeotti has carried out his task, and with gratitude for the valuable material and the judicious commentary with which he has enriched the literature of comparative law.

H. W. R. Wade.

Curia Regis Rolls of the reign of Henry III preserved in the Public Record Office, printed under the superintendence of the Deputy Keeper of the Records. 7 to 9 Henry III. Vol. XI [London: Her Majesty's Stationery Office. 1955. xv and 749 pp. £9 9s. net.]

This volume of extant *Curia Regis Rolls* for the years 1223 and 1224 continues the series already printed from the reign of King John and the early years of Henry III. The text has been prepared in the main by Sir Cyril Flower and an introduction contributed by Mr. C. A. F. Meekings of the Public Record Office gives some interesting information on the history of the rolls themselves and describes certain of their characteristics, particularly marginations, and there is also a list of justices compiled from the extant feet of fines.

The text is a straightforward transcription of the pleas with footnotes on the text itself and cross-references to Bracton's *Note Book*. There is no translation, the text being the original Latin except where it breaks rarely into the juror's English (*e.g.*, pl. 959 gives an early version of the custom of Kent—*The father to the bough, the son to the plough*). These volumes are therefore source books presenting raw material, though the work of pursuing any particular topic is greatly aided by some excellent indexes. (Some references are followed almost irresistibly, *e.g.*, "Injuries, Nose, loss of, during enforced marriage.") But the historian, legal or otherwise, who intends researching into the records of this time, as distinct from pursuing isolated cases and references, will first consult the series of the Selden Society, particularly Lady Stenton's volumes (vols. 67 and 68), and Sir Cyril Flower's own volume (vol. 62) introductory to the *Curia Regis Rolls* from 1199 to 1230, though this latter volume deals more largely with the reign of King John than the minority of his son.

It is impossible to describe in detail the varied contents of this volume. The general impression of royal justice is that it is expeditious and fair. The possessory assizes are popular and rightly so. If much of the procedure appears to the modern reader somewhat technical, this may be because it is not altogether familiar. There is less ritual than previously. The ritual trial of crime by

the ordeal has been abolished and the jury is beginning to pervade common law procedure. There are many entries of Grand Assize, but this mode of trial of a writ of right gave great advantages to the tenant. Inquests of ordinary juries of the country are now becoming more popular. Fees may be still exacted for them (see index "Oblations"), but not for long. (Sometimes it took a long time to get a verdict, *e.g.*, seven years from Cornwall in pl. 1503; see Bracton's *Note Book*, pl. 991, pl. 596.) Nevertheless there are cases of the nature of pl. 1937, which relates the fining of a litigant in the county court for sitting down before waging his law formally. The law of essoins too is growing into the intricate set of rules so beloved of the medieval common lawyer. Bracton gives it a whole section in his *De Legibus Angliae*, and a little later Hengham C.J. a whole treatise. The omission of the membranes of essoins from the volumes of *Curia Regis Rolls* is now not so serious since Lady Stenton's work (see Sel. Soc. Vol. 67, pp. 150 *et seq.*). On the whole, however, the pleas give promise for the future. Pleas of trespass are by this time mentioned more frequently, though the remedy is as yet by no means common (see Bracton's *Note Book*, pl. 85 (1220), and Maitland's comment thereon).

Social and economic life is reflected vividly in many pleas. Endowment at the church door is charmingly illustrated in pl. 251. But despite the end of civil wars there is no lack of violence; *e.g.*, pl. 1079 gives the story of a savage and aggravated assault followed by equally savage punishment. In this connection Fawkes de Breauté, that epitome of the bold bad baron, is worth following through any index. His most recent exploit is the attempted kidnapping of royal justices sent down to Dunstable in June, 1224, to check his oppressive practices and who had, according to the old chroniclers, fined him £100 on each of more than thirty adverse verdicts (pleas 1914–1934 give a record of Fawkes' recent disseisins discovered by this inquisition). Of the commission headed by Martin de Pateshull he had only managed to catch one itinerant justice, Henry de Breibroc, whom he imprisoned in his castle at Bedford (pl. 1687). But he has now at last overstepped the bounds of royal favour: "immo est contra dominum regem et inimicus suus" (pl. 1626) no longer "ad pacem domini regis et amicus suus" (pl. 2780). Fawkes himself retired to Wales where his daughter was conveniently married to the reigning prince. But later in the year he is back in England, disarmed (pl. 1913) and "priso in custodia domini regis" (pl. 2631). Next spring, his castle at Bedford destroyed, his property forfeited and his brother hanged, he himself is banished abroad. Exit a colourful figure. There is also plenty of colour in more homely circumstances. In pl. 818, for example, Petronella pleads that her father "amavit aliam feminam quam suam et ivit jolivandi de loco in locum et odio habuit heredes snos ita quod nichil retinuit de terra sua." And what is to be made of

the statement in pl. 527 by a son that his father's charter should not stand because the latter was at least 140 years of age when he executed it "ita quod amisit memoriam suam?" He lost. The rest of the case is worth reading.

The economic historian will find many fascinating entries. Thus there are many pleas giving vivid glimpses of the sort of services due under unfree tenure; *e.g.*, pleas 830, 1312, 1600, make a most interesting trio. They will interest the legal historian also for the reason that the first is sidelined on the membrane but not in Bracton's *Note Book*; the second is sidelined with the note "Loquatur mecum de hoc capitulo" written across it in the Bracton hand; it went into the *Note Book*, as did pl. 1600. The collation of these rolls with the *Note Book* is of particular importance in many instances because Maitland did not use the De Banco Rolls which were still in the Tower when he prepared his edition of the *Note Book*. Often Maitland's extraordinary feel for the material enables him to make the necessary correction, but some corruptions were beyond him (*e.g.*, see pl. 1630 correcting pl. 1001 of *Note Book*).

We notice finally that this volume is priced at nine guineas. This seems to confine its use pretty effectively to that of the library copy.

D. E. C. Yale.

Epieikeia: A Discourse on Equity in Three Parts. By Edward Hake. Edited by D. E. C. Yale, Research Fellow of Christ's College, Cambridge; of the Inner Temple, Barrister-at-Law. [New Haven: Yale University Press; London: Oxford University Press. 1953. xxix and 144 and (tables and index) 7 pp. $3.00; 24s. net.]

The care which the editor has clearly bestowed upon this work is justified, not so much by its intrinsic merit as by the fact that it was written towards the end of the reign of Elizabeth; the discussion of equity has lost the moral flavour of St. Germain's *Doctor and Student*, and is just beginning to acquire the constitutional bias of Stuart times. It is in three parts and in the form of a rather tedious dialogue—Hake's interrogators rarely do more than assure him of the value of his observations. A consideration of equity in general is followed by an industrious examination of the part played by the Equity of the Common Law both in the interpretation of statutes and in the "gyving or equalling of actions" (p. 103). The account of the Equity of the Chancery—which Hake had intended as the major part of the work—is disappointingly meagre in comparison, perhaps because Crompton and West had forestalled him. It does,

however, indicate an awareness of the impending clash and shows signs of second thoughts. The discussion of the equity of the common law almost suggested a conclusion that it was sufficient and the interference of the Chancellor unnecessary; rather different is the tone of the later part with its statement that "As the court of Starre Chamber is by the absolute power of the Prince knowne to the Common lawe for causes cryminall, so the courte of Chauncery is the absolute power of the Prince knowen also to the Common lawe for causes civile" (pp. 139–140). This allusion to absolute power and the whole account of the history of the court of Chancery may well have been added—in vain—for the benefit of James I.

The work itself can hardly be described as being of general interest, but a student of the history of equity will do well to regard both the Preface by Professor Thorne and the Introduction by Mr. Yale. The English price seems excessive.

M. J. Prichard.

Chitty on Contracts. Twenty-first Edition. In two volumes. General Editors: John Burke and Peter Allsop. Vol. I: General Principles. Editors: Kenneth Scott, m.a., of the Middle Temple, Barrister-at-Law, and Bryan Clauson, m.a., of Linclon's Inn, Barrister-at-Law. Vol. II: Specific Contracts. Editors: Eight Barristers-at-Law. [London: Sweet & Maxwell, Ltd. 1955. Vol. I, clxiv and 756 and (index) 81 pp. Vol. II, cxxxi and 681 and (index) 68 pp. £7 15s. net. 2 vols.]

Chitty on Contracts first appeared in 1826, four years younger than Archbold's *Criminal Law*; age seems to be a characteristic of practitioners' books, and it is not to their detriment. A new galaxy of talent has brought out the present edition, a complete change of editors; but the modernising policy of recent editions has been continued. The book has the comprehensiveness necessary for a practitioner's work, and it cites most of the authorities given in elementary books, but not with the same emphasis on their importance. Sometimes a case is cited on the point for which it stands, and an immense amount of criticism, to which but little reference is given, is disposed of by a well-turned footnote, getting the same result in the end: as in Volume I, page 232 (n.).

The book is now published in two volumes, each with its own index and index of cases which is somewhat inconvenient when one is looking for a case reference. A very great improvement is that the text is now in numbered paragraphs, with the headings in heavy type. It follows the recent convention of supplements

keeping it up to date, and giving it a much longer useful life. It is some 240 pages longer than the last edition; this is explained by the addition of three entirely new chapters. Other additions make the chapters in Volume II (2 and 13) on Bailments and Sale of Goods very useful for the student studying these subjects in Contract and the Law of Personal Property, and there are other such cross-overs.

It takes a book like Chitty, or its relative in Tort, Clerk and Lindsell, to bring emphatically to the mind of a student how very important are cases on these subjects. The indices of cases in Chitty are 245 pages of cases, in Clerk and Lindsell there are 128 pages. By far the greatest portions of the law of contract and the law of tort have been built up by cases; and there has been a startling number of cases required to interpret the few bits of law that have been codified.

There is little in Chitty to criticise, and much to praise. Perhaps some of the chapters on special types of contract are not sufficiently full for the use of a practitioner, that on agency, for example. Little enough reference has been made throughout the book to other works or to articles. There are not many mistakes. *Milch* v. *Coburn* (1910) 27 T.L.R. 170 was reversed on appeal. *Bonsor* v. *Musicians' Union* [1954] 2 W.L.R. 687 has now been reversed [1955] 3 W.L.R. 788; but this will be noted in the Supplement.

With the admitted excellence of the usual textbooks for students on the law of contract goes the regrettable fact that they are not always written in easy language. Mr. Kenneth Scott must have spent a lot of his lecture hours in making the current textbooks intelligible to his students. He has seen to it that his portion of Chitty is readable, simple, and easily understood and assimilated. Perhaps a textbook is meant to be a brain exercise; whilst a barrister or solicitor wants his information put plainly, so he can use it quickly, and without the risk of mistaking the meaning of what he is reading. This is not to say that a student, or a syndicate of students, should buy this expensive book; but it is a suggestion that if a student cares to take his turn at the library copy he will find much simpler statements of some topics than the elaborate, wordy, and academic statements and speculations in the students' textbooks. For example, *Dickinson* v. *Dodds* (1876) 2 Ch.D. 463, is nicely handled in Volume I, sections 43 and 44: Mistake as to person in sections 418 to 421; and once the student gets started he will find many others.

It is a pleasure to thank the editors for the very good work they have done in turning out this edition of Chitty. And the paper, printing, and binding are a credit to the publishers.

H. Barnes.

Books also received include the following:—

British Commonwealth Series—United Kingdom in 2 separate volumes. [Stevens & Sons, Ltd. 1955. £6 6s. the 2 volumes.]

CHAMBERLAIN, J. P., *International Organization.* [The Carnegie Endowment for International Peace. 1955. $1.75 net.]

CORWIN, E. S., *The "Higher Law" Background of American Constitutional Law.* [Oxford University Press. 1955. 7s. 6d.]

DENNING, SIR ALFRED, *The Road to Justice.* [Stevens & Sons, Ltd. 1955. 10s. 6d.]

DEAN, J., *Hatred, Ridicule or Contempt*—A book of libel cases. [Pan Books Ltd. 1955. 2s.].

Laws Concerning Nationality. United Nations Legislative Series. [London: H.M. Stationery Office. 1955. 30s. net.]

MCNAIR, SIR ARNOLD D., *Development of International Justice.* [New York University Press. 1954. $2.50 net.]

MEGARRY, R. E., *Miscellany-at-Law.* [Stevens & Sons, Ltd. 1955. 25s.]

ROBB, L. A., *Dictionary of Legal Terms*—Spanish/English and English/Spanish. [Chapman & Hall. 1955. 64s.]

RE, E. D., *Selected Essays on Equity.* [Oceana Publications. 1955. $15.00.]

Status of Multilateral Conventions of which the Secretary-General acts as Depositary. [United Nations. 1953. Loose leaf. $5.00 net.]

TALBOT, W. F., *Company Meetings.* [Stevens & Sons, Ltd. 1955. 17s. 6d.]

New editions:—

Basu's Commentary on the Constitution of India. 3rd edition. Vol. 1. [S. C. Sarkar & Sons, Ltd. 1955. N.P.]

COWEN, D. V., & GERING, L., *The Law of Negotiable Instruments in South Africa.* 3rd edition. [Juta & Co., Ltd. 1955. 72s. 6d.]

EDWARDS, N., *The Courts and the Public Schools.* Revised edition. [University of Chicago Press—Cambridge University Press. 1955. 75s.]

GRAVESON, R. H., *The Conflict of Laws.* 3rd edition. [Sweet & Maxwell, Ltd. 1955. 40s.]

HOOD PHILLIPS, O., *First Book of English Law.* 3rd edition. [Sweet & Maxwell, Ltd. 1955. 17s. 6d.]

International Court of Justice Yearbook 1954–55. [Sijthoff's Publishing Co. 1955. N.P.]

MEGARRY, R. E. *A Manual of the Law of Real Property.* 2nd edition. [Stevens & Sons, Ltd. 1955. 37s. 6d.]

MAXWELL, W. H., & L. F., *Legal Bibliography of the British Commonwealth of Nations.* [Sweet & Maxwell, Ltd. 1955. £3 10s.]

Odgers' Principles of Pleading and Practice. 15th edition. [Stevens & Sons, Ltd. 1955. 50s.]

Wade & Phillips—Constitutional Law. 5th edition. [Longmans, Green & Co. 1955. 35s.]

UNIVERSITY LAW SOCIETY

1954–1956

With membership totalling three hundred and ninety, and four hundred and fifty in the two years under review, out of some seven hundred undergraduates reading law, the Law Society would appear to be one of the largest of the Faculty Societies in the University. The officers are now elected by a ballot of the Society rather than by a Committee of College Secretaries and the poll has drawn about half of the members in each of the three elections held so far.

For the year from Easter 1954 the officers were:—President, M. C. Nourse (Corpus Christi); Vice-President, F. Francis, B.A. (Trinity Hall); Secretary, R. Heron (Selwyn); and Junior Treasurer, J. I. McG. Gilfillan (Christ's): and from the Easter Term 1955 they were succeeded by, as President, G. Slynn (Trinity); Vice-President, J. W. N. Petty, B.A., (Caius); Secretary, W. H. Goodhart (Trinity); Junior Treasurer, M. Zander (Jesus). Professor C. J. Hamson continued to serve as Senior Treasurer.

In the first year the Master of the Rolls and Lord Justice Denning spoke to the Society—the former on the doctrine of precedent, in which he stressed the need for a supreme judicial body to ensure that the Law was in touch with the needs of each generation, while the latter analysed the development of the "Hospital cases" in recent years. Another aspect of claims alleging medical negligence was described by the Secretary of the Medical Defence Union at a meeting of the Medical Society, open to the Law Faculty. These two Societies again met together for Dr. Jonathan Gould's lecture on "Physiological Factors in Major Crime." Lord Kilmuir, the Lord Chancellor, spoke to the Conservative and Law Societies; and Mr. Melford Stevenson, Q.C., spoke on the Legal Aspects of the Crichel Down Case.

During the year from 1955–1956 we joined with the Liberal Society in the Lent Term when Mr. Justice Sellers told of the careers of well-known "Lawyers and Politicians" before a large and presumably not disinterested audience. Professor Goodhart at the last meeting of the year greatly entertained the Society with reminiscences about another group of jurists and judges, English and American, in "Some Lawyers I have known."

On matters of substantive law, the Society was addressed by Lord Justice Morris on "Modern Trends in the Law"; by Mr. Justice Pearson on "Negligence"; by Lord Reid on "The Reasonable Man" and by Mr. Justice Devlin on the effect, on the contracting parties and the courts, of arbitration clauses. We

were also very fortunate that Professor M. Rheinstein of the University of Chicago Law School was able to find one free evening, at the end of a whirlwind tour, to talk on "Marriage Stability and the Law of Divorce," and to describe the research project under his guidance in Chicago.

Because so many members of the Society plan a legal career, the account of Sir William C. Crocker, a former President of the Law Society on "Running a Solicitor's Business" proved of great interest.

Three moots were very well argued before Mr. Justice Upjohn and Judge Lawson Campbell in the first year and before Judge H. C. Leon in 1956. The last moot, whose counsel only the caretaker could stop, was held with the Holdsworth Law Club of the University of Birmingham appearing for the appellants and the decision went in their favour. We, in return, were invited to moot at Oxford on a point involving mistake in contract before Mr. Justice Havers; and the Society was represented in debates at the Law School in Edinburgh, and with the Law Society of Trinity College, Dublin, where very good relations seem to have been established in a short week-end.

Despite these excursions, it was an all-day visit to Broadmoor in November which really presented the Law in action. Even an early morning start and the rigours of eighty miles each way in a double-deck bus did not deter many applications for the fifty places. Dr. Gould had most kindly arranged, with the Deputy Medical Superintendent, a day of considerable interest and generous hospitality, and a tour of the buildings made it possible not only to see the remedial centres and to hear of the treatment used, but also to talk at length with many of the hospital's patients. At a time when methods of punishment are being criticised and reviewed in print and Parliament, it was very valuable to learn something of the problems involved in at least one sphere and to think over current ideas of insanity and legal responsibility.

The current year began with a Garden Party at Magdalene, and ended with a dinner of the Society at Trinity, when Mr. Justice Roxburgh, Judge Lawson Campbell and Professor Holland were present, together with solicitors practising in Cambridge who are members of the University.

The Society begins the next year with, as new officers—President, W. H. Goodhart (Trinity); Vice-President, H. de B. Forde (Christ's); Secretary, W. Reid (Trinity) and Junior Treasurer, A. H. Evans (St. John's).

G. Slynn.

Communications concerning articles and notes should be addressed to the Editor, Professor C. J. Hamson, Trinity College, Cambridge.

Books for review should be sent to the Cambridge Law Journal, Squire Law Library, The Old Schools, Cambridge.

Subscriptions for the journal are accepted by the Treasurer whose address is care of the Journal, as above.